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RAILROAD REPORTS

(Vol. 64 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES

EDITED BY

THOMAS J. MICHIE.

VOLUME XLI.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.

1912.

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RAILROAD REPORTS

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner *v.* ERASTUS W. WILLARD, Administrator of the Estate of Harold R. Wellman, Deceased.

(Submitted March 17, 1911. Decided April 10, 1911.)

[31 Sup. Ct. Rep. 460.]

Appeal and Error—Questions Reviewable—Jurisdiction below.—An appellate Federal court can and should consider on its own motion the question of the jurisdiction of a Federal circuit court to which a cause has been removed from the state court, as presenting a separable controversy, although the plaintiff withdrew and did not review his motion to remand to the state court, but went to trial in the Federal court without objection.

Removal of Causes—Separable Controversy—Joint Action.—A case in which plaintiff has elected, in conformity with the settled law of the state, to sue jointly in tort a nonresident lessee railway company, exclusively operating, controlling, and managing the road, and its resident corporate lessor, upon a cause of action arising in the state, out of the negligent operation of the road, cannot be removed to a Federal circuit court as presenting a separable controversy between the plaintiff and the lessee, although the lessor may have been joined for the purpose of excluding the Federal jurisdiction.

Removal of Causes—Separable Controversy—Fraudulent Joinder.—Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a Federal court, cannot be established, where, by the settled law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of Illinois, Eastern Division, in favor of defendants in an action in tort which had been removed to that court from a state court, and remanded the cause with directions to remand to the state court. Affirmed.

See same case below, 91 C. C. A. 215, 165 Fed. 181.

The facts are stated in the opinion.

Messrs. Albert J. Hopkins and Chester M. Dawes for petitioner.

Messrs. Arthur J. Eddy, Emil C. Wetten, Patrick C. Haley, and Coll McNaughton for respondent.

Chicago, etc., R. Co. v. Willard

MR. JUSTICE HARLAN delivered the opinion of the court:

This suit originated in one of the courts of Illinois. It is a joint action against two railroad corporations,—the Chicago, Burlington, & Quincy Railway Company of Iowa, and the Chicago, Burlington, & Quincy Railroad Company of Illinois,—to recover damages alleged to have been caused by the negligence, carelessness, and improper conduct of the defendants by their agents and servants, whereby one Harold R. Wellman, the intestate of the plaintiff, was killed. The particular railroad from the operation of which the injuries in question arose is located wholly in Illinois, and the plaintiff, Willard, is a citizen of that state. The case involves a question, to be presently mentioned, of the jurisdiction of the circuit court. It also involves a question as to the power and duty of an appellate Federal court, where it appears, from the record, that a subordinate court has disposed of a case of which it could not properly take cognizance, but in respect to which the parties are silent.

The facts are: The defendant, the Iowa corporation, filed its petition for the removal of this cause to the circuit court of the United States. It appears that in November, 1901, the Chicago, Burlington, & Quincy Railroad Company of Illinois leased, for a period of ninety-nine years from September 30th, 1901, to the Chicago, Burlington, & Quincy Railway Company of Iowa, its line of railway, and the rights, privileges, franchises, rights of way, yards, stations, tracks, and all appliances thereunto belonging, including in the lease that part of the road in Illinois described in the declaration; that the lessor company also assigned to the lessee company all other real and personal property not above mentioned, and all the rights, privileges, immunities, and franchises of the lessor company, except its franchise to be a corporation; that after December 21st, 1901, as well as on the day of the alleged injury and death of Wellman, the Iowa company operated and was then operating, controlling, and managing the railway lines of the Illinois company. At the time of the injuries complained of, neither the Illinois company nor any of its servants controlled, used, or operated the railroad engine or cars with which the deceased came into contact and was killed, but that the management, custody, control, and operation of the leased road and property was with the Iowa corporation exclusively; and that there was, it is alleged, a separable controversy between the Iowa company and the plaintiff, citizen of Illinois, which entitled that corporation to have the cause transferred for trial into the Federal court. It was further alleged that as the plaintiff was a citizen of Illinois, the two corporations were fraudulently and improperly joined as co-defendants for the purpose of defeating the removal of the case to the Federal court.

Chicago, etc., R. Co. v. Willard

The state court made an order recognizing the right of the Iowa corporation to have the cause removed to the Federal court. Subsequently, in the circuit court of the United States, the plaintiff moved to remand the case to the state court; but a few days thereafter he was given leave to withdraw that motion and to amend his declaration. He did not renew the motion to remand, but was given leave to amend his declaration, under which privilege he made extended amendments. But we do not perceive that those amendments affect the conclusion which, in our judgment, must be reached in the determination of the cause. The case remained throughout as a joint action against two companies, one of which was a corporation of the state of which the plaintiff was a citizen. What would have been the effect of any amendment made by the plaintiff, in the circuit court, eliminating or dismissing the lessor company, the Illinois corporation, altogether as a party defendant, thus leaving the case as presenting issues between citizens of different states only, we have no occasion now to determine. A trial was had in the circuit court, between the plaintiff and the two corporations, without objection as to the jurisdiction of that court, and at the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, and a judgment was accordingly rendered for them. The case went to the circuit court of appeals, where that court, being of opinion that the record disclosed a want of jurisdiction in the circuit court of the United States, the judgment was reversed, with directions to remand to the state court. That action was taken by the circuit court of appeals upon its own inspection of the record, and without any suggestion by either party as to a want of jurisdiction in the circuit court. The case is now here upon certiorari.

Had the circuit court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the circuit court of appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court,

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"on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In *Ayers v. Watson*, 113 U. S. 594, 598, 28 L. ed. 1093, 1094, 5 Sup. Ct. Rep. 641, Mr. Justice Bradley, speaking for the court, and referring to the 2d section (the removal section) of the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Com. Stat. 1901, p. 509], said: "In the nature of things, the 2d section is jurisdictional, and the 3d is but modal and formal. The conditions of the 2d section are indispensable, and must be shown by the record; the directions of the 3d, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510." In *Cameron v. Hodges*, 127 U. S. 322, 326, 32 L. ed. 132, 134, 8 Sup. Ct. Rep. 1154, it was held to be an express requirement of the statute that the circuit court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance. In *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 673, 689, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: "Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed." In *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 62, 63, 48 L. ed. 870, 877, 878, 24 Sup. Ct. Rep. 598, in which both parties insisted upon the jurisdiction of the circuit court, the said court: "Consent of [the] parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." In *Thomas v. Ohio State University*, 195 U. S. 207, 211, 49 L. ed. 160, 164, 25 Sup. Ct. Rep. 24: "It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court,

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even if the parties fail to call attention to the defect, or consent that it may be waived." In *Kentucky v. Powers*, 201 U. S. 1, 35, 50 L. ed. 633, 648, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692, it was said that this court "must see to it that they [the subordinate courts of the United States] do not usurp authority given to them by acts of Congress,"—citing *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510. In *Perez v. Fernandez*, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup. Ct. Rep. 561, which came to this court from the district court of the United States for the district of Porto Rico, this court, upon the authority of the *Swan* and other cases cited, held that "where the jurisdiction fails, the objection can be raised in this court; if not by the parties, then by the court itself." There are many other authorities to the same effect, but we cite a few of the additional cases. *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Blacklock v. Small*, 127 U. S. 96, 103, 105, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 242, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Graves v. Corbin*, 132 U. S. 571, 589, 33 L. ed. 462, 468, 10 Sup. Ct. Rep. 196; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

We now come to the question of jurisdiction upon its merits. If, under the statutes relating to the jurisdiction of the Federal courts, and upon the facts as disclosed by the record and litigated, the circuit court could not have taken cognizance of the case, then, according to the authorities above cited, it was the duty of the circuit court of appeals, upon its own motion, and without regard to the wishes of the parties or of either of them, to reverse the judgment of the trial court, with directions to remand the case to the state court.

We are of opinion that the circuit court could not properly take cognizance of this case. The action was brought by a citizen of Illinois against two companies,—one a corporation of Iowa and the other a corporation of Illinois. It is said that as, long before the injury complained of, the Illinois corporation, the legal owner of the railroad in question, had leased to the Iowa company its road, with its property, rights, privileges, yards, stations, etc., appertaining thereto (excepting only the lessor company's franchise to be a corporation), and was in no-wise, by its agents or servants, in the control of the road or of its operations at the time the plaintiff intestate was killed, the making of that corporation a party defendant in order to

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defeat the removal of the case to the Federal court was fraudulent and improper. A complete answer to this suggestion is that, by the settled law of Illinois at the time the injury in question was received, the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that state, in the exercise of its governmental powers, to say that one of its own corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease.

In *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 414, 66 L. R. A. 75, 70 N. E. 654, the supreme court of Illinois, after referring to *Elliott on Railroads*, in which it is admitted that the weight of authority was that the lessor company, unless expressly exempted by statute, was liable for injuries caused by the negligence of the lessee company, its agents and servants, said: "We think this court is committed to the view held by the current of authorities on the question, and, moreover, that, in sound reason and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by actionable negligence of the lessee company. The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by non-user. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the state had created it to perform. The statute which authorized it to operate its road by means of a lessee did not, however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. 3 Starr & C. Anno. Stat. 1896, p. 3247. Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. *Balsley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees, has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to

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whom is intrusted the operation of their roads are competent, and that they perform the duties devolving upon them with ordinary care and skill; for upon the character and condition of safety of such engines and cars, and on the competency and care of such employees, depend the lives and property of the general public. As a matter of public policy, such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands. The general assembly of this state, though willing to permit railroad companies to operate their lines of road by lessees, refrained from relieving the lessor companies from any of their obligations, duties, or liabilities. Therefore it is that though a railroad company may, by lease or otherwise, intrust the execution of its chartered powers and duties to a lessee company, this court has expressed the view [that] the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company.

In *West Chicago Street R. Co. v. Horne*, 197 Ill. 250, 251, 64 N. E. 331, the state supreme court said that "the law is well settled that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its tracks, both the lessor and the lessee are liable to respond in damages to the party injured,"—citing *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago & E. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290. In the *Ellett* case, the language of the court was: "The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." Many cases in Illinois were cited by the state court in support of its view.

It is thus made clear that if the plaintiff had any cause of action on account of the injury in question, he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action. In *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 96, 97, 42 L.

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ed. 673-675, 18 Sup. Ct. Rep. 264, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking by Mr. Justice Gray, said: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which it brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said: 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings,'"—citing *Pirie v. Tvedt*, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; *Little v. Giles*, 118 U. S. 596, 600, 601, 30 L. ed. 269-271, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Torrence v. Shedd*, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; *Connell v. Smiley*, 156 U. S. 335, 340, 39 L. ed. 443, 444, 15 Sup. Ct. Rep. 353.

In the case of *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 216, 218, 50 L. ed. 441, 446, 447, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147, after referring to *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735, in which Chief Justice Waite said that a defendant had no right to say that an action shall be several which a plaintiff elects to make joint, this court, speaking by Mr. Justice Day, said: "The language is used of an action begun in the state court; and it is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal. (*Wilson v. Oswego Twp.*, 151 U. S. 56, 66, 38 L. ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being

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the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal,"—citing the above cases, and, in addition, *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; *Graves v. Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609. Again, in the same case: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complainant, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court."

It results that, upon the face of the record, the action throughout was proceeded in as a joint action, and that there was no separable controversy in such an action, entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a co-defendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa companies. *Illinois C. R. Co. v. Sheegog*, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the Federal court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies, and to carry it on in that form to a conclusion. The silence of the parties, at the trial or

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in the appellate court, on the question of jurisdiction, could not, in disregard of the judiciary act, confer authority on the circuit court to try the case. The circuit court of appeals, therefore, properly, of its own motion, reversed the judgment of the trial court, and sent the case back to the circuit court, with instructions to remand it to the state court. Restricting this opinion to the case made by the record before us, and as litigated, and without imagining cases in which the rules herein announced might be difficult to apply, the judgment is affirmed.

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(Supreme Court of Mississippi, April 10, 1911.)

[54 So. Rep. 804.]

Waters and Water Courses—Natural Water Courses—Change of Course of Stream—Obstruction of Water—Liability.*—Where defendant railroad company, in properly constructing its roadbed, caused a stream, in conjunction with high water therein, to leave its usual channel on plaintiff's land and break into the excavations on defendant's right of way, defendant could erect barriers, in order to turn the stream back into its old channel, even if plaintiff's land was thereby injured.

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by C. M. Brown against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes & Longstreet, for appellant.

J. M. Foreman and Shannon & Jones, for appellee.

ANDERSON, J. The appellee, Brown, sued the appellant, the Yazoo & Mississippi Valley Railroad Company, for damages claimed to have been sustained by him through the inundation of his land, caused by a dam built by the appellant to divert Foster's creek from its new channel on appellant's right of way to its old channel on the land of appellee. From a judgment in favor of the appellee for \$500, appellant prosecutes this appeal.

*For the authorities in this series on the subject of the liability of a railroad for discharging water upon the property of others, see first foot-note of *Delashmutt v. Chicago, etc., R. Co.* (Iowa), 37 R. R. R. 15, 60 Am. & Eng. R. Cas., N. S., 15; *St. Louis S. W. Ry. Co. v. Mackey* (Ark.), 37 R. R. R. 279, 60 Am. & Eng. R. Cas., N. S., 279; *Southern Ry. Co. v. Lewis* (Ala.), 35 R. R. R. 778, 58 Am. & Eng. R. Cas., N. S., 778.

Appellee's land adjoins appellant's railroad right of way. Until some time in the spring of 1908, Foster's creek ran through appellee's land in the same general direction of, and only a short distance from, the railroad, being nearer at some points than at others. Appellant's road was constructed more than 20 years before the alleged injury complained of. In its construction, where it adjoins appellee's land, the railroad track is laid on an embankment, or fill, which was made necessary on account of the land traversed being low. The building of this embankment necessitated excavations from the right of way on either side, leaving depressions. During an overflow in the spring of 1908, the waters of Foster's creek left their old channel on appellee's land, and broke over into the depression so made on the west side of appellant's track, forming a new channel on its right of way, where it has since continued to flow. By the flow of its waters through this new channel, it soon began to cut into and undermine the embankment on which appellant's track is located. For the purpose of diverting the waters of this stream back into the old channel, the appellant, during the year 1908, built dams across it, which were washed away. In 1909, by driving down piling, a dam was finally constructed, which stood for a while and forced the water into the old channel. The gravamen of appellee's suit is that the appellant had no right to construct this dam, and divert the waters back to the old channel; that, if it had such a right, it could not be exercised, unless the appellant first cleaned out the bed of the old channel, which had, since the creek changed its course, been filled up to some extent by the deposit of sand and gravel, causing the waters, when turned back, to wash and destroy his land. The appellant assigned as error the refusal of the court below to instruct the jury to return a verdict in its favor.

Where a stream has left its accustomed channel, and formed a new channel on the land of an adjoining riparian owner, the latter has the right, by the erection of barriers, to turn the waters of such stream back from the new to the old channel. The maxim, "*Aqua currit et debet currere, ut currere solebat*," applies. The waters of a stream ought to run in its old channel, and no one can justly complain that one who has the right to have them so run makes them run there. *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Pierce v. Kinney*, 59 Barb. (N. Y.) 56; *Gould on Waters* (3d Ed.) § 204. And the riparian owner, on whose land the new channel is formed, may erect barriers and turn the waters of such stream back from the new to the old channel, without being required first to clean out such old channel, so as to restore it to the depth and condition it was in before the stream changed its course. *Pierce v. Kinney*, *supra*. The reason of the change in the course of the stream is the fault of neither owner. It is from natural causes. It is

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true in this case the depressions along appellant's roadbed, made in the construction of its road, in connection with the high waters of the creek, caused the stream to leave its old channel and form a new one. But this was not appellant's fault. By condemnation of or deed to its right of way it acquired the right to make the necessary excavations to build its roadbed, and if in properly constructing such roadbed it resulted in the creek leaving its old channel, still appellant had the right to turn it from its new back to its old channel.

It is contended by appellee that he acquired a right, by prescription, to have the creek flow in the new channel; that the excavations which, in connection with the overflow, caused the new channel, were made more than 20 years before the bringing of this suit. There is no foundation in fact for such contention, for the testimony, without conflict, shows that the creek never left its old channel until the spring of 1908.

Appellee has no cause of action. The court should have directed a verdict for the appellant.

Reversed and remanded.

STATE *v.* NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Tennessee, March 4, 1911.)

[135 S. W. Rep. 773.]

Constitutional Law—Class Legislation—Regulation of Corporations.—Laws 1887, c. 208, forbidding any corporation, joint-stock company, or association to discharge any employee or threaten to do so for voting or not voting at any election, or for or against any candidate or measure, or for trading or not trading with any particular person or class of persons, and providing that any violation shall be a misdemeanor, and visited with a fine, and that any officer or agent of any corporation, etc., who shall make or execute any notice or threat so forbidden shall be guilty of a misdemeanor, and punished by fine and imprisonment, is in violation of Const. art. 11, § 8, forbidding any special grant of privileges, immunities, or exemptions, since the failure to include partnerships and individuals within the scope of the statute amounts to a discrimination against corporations, etc.

Constitutional Law—Equal Protection of the Laws.—The statute is also invalid, as denying corporations the equal protection of the laws, in violation of the fourteenth amendment to the federal Constitution.

Constitutional Law—Statutory Regulation—Class Legislation.—The General Assembly may enact laws containing a reasonable classification of the objects of legislation, but the classification must

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not be merely arbitrary. It must have some basis, which bears a natural and reasonable relation to the object to be accomplished, and there must be some good reason why the particular class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others, should be so preferred or discriminated against.

Constitutional Law—Equal Protection of the Laws—Classification of Persons.—If legislation arbitrarily confers upon one class benefits from which others in a like situation are excluded, and imposes burdens upon one class not imposed upon others, it is a grant of a special right to those benefited, and a denial of equal protection of the laws to those subject to the burden.

Constitutional Law—Class Legislation—Equal Protection of the Laws.—Where a classification of corporations or of employers is natural and reasonable, and based upon some distinctive difference in the business of the several classes, a difference peculiar to and inhering in its very nature, it is valid; but legislation that affects certain acts of corporations, and does not affect similar acts by individuals, is class legislation, and denies to such corporation the equal protection of the laws.

Error to Circuit Court, Maury County; W. O. Gordon, Judge.

The Nashville, Chattanooga & St. Louis Railway Company was indicted for violating Acts 1887, c. 208, by threatening to discharge an employee for trading with certain merchants. From a judgment of the circuit court, quashing the indictment, the State brings error. Affirmed.

The Attorney General, for the State.

Hatcher & Hatcher, for appellee.

SHIELDS, C. J. This case involves the constitutionality of chapter 208 of the published Acts of the General Assembly of Tennessee for the year 1887, which act is in words and figures, as follows:

"An act to prevent joint-stock companies, associations, and corporations organized or chartered under the laws of this state, from impairing or infringing upon the rights, privileges, and liberties of their servants and employees.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall be unlawful for any joint-stock company, association, or corporation, organized, chartered, or incorporated by and under the laws of this state, or operated or doing business in this state under its laws, either as owner or lessee, having persons in their service as employees, to discharge any employee or employees, or to threaten to discharge any employee or employees in their service for voting or not voting in any election, state, county, or municipal, for any per-

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son as candidate or measure submitted to a vote of the people, or to threaten to discharge any such employee or employees for trading or dealing or for not trading or dealing as a customer or patron with any particular merchant or other person or class of persons in any business calling, or to notify any employee or employees, either by general or special notice, directly or indirectly, secretly or openly given, not to trade or deal as customer or patron with any particular merchant or person or class of persons, in any business or calling, under penalty of being discharged from service of such joint stock company, corporation or association doing business in this state as aforesaid.

"Sec. 2. Be it further enacted, that any joint-stock company, association, or corporation organized, chartered, or incorporated under the laws of this state, or operated in this state, violating any of the provisions of the foregoing section, shall be guilty of a misdemeanor; and on conviction shall pay a fine of not less than one hundred dollars and not more than one thousand dollars, for each offense for which convicted.

"Sec. 3. Be it further enacted, that any person acting as an officer or agent of any joint-stock companies, associations, or corporations of the kind and character hereinbefore described, or for any one of them, who makes or executes any notice, order, or threat, of the kind and character hereinbefore forbidden, shall be guilty of a misdemeanor, and, on conviction, shall pay a fine of not less than one hundred dollars and not more than five hundred dollars, and be imprisoned in the county jail not less than ten days nor more than three months."

The defendant in error, a corporation incorporated and organized under an act of the General Assembly of this state, passed previous to the adoption of the Constitution of 1870, was indicted under the first section of this act, and charged with having threatened to discharge a certain one of its employees for trading or dealing as a customer with a certain merchant named. It appeared and moved the court to quash the indictment upon the ground that the statute in question was unconstitutional and void because violative of article 1, § 8, of the Constitution of Tennessee, ordaining that "no man shall be disseised of his freehold, liberties or privileges * * * or deprived of his life, liberty or property but by the judgment of his peers or the law of the land," and of article 11, § 8, of the same Constitution, ordaining that "the Legislature shall have no power to * * * pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law," and of the fourteenth amendment of the federal Constitution, ordaining that "no state shall deprive any

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person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law," and also because the act contains two subjects, and violates article 2, § 17, of the Constitution of this state.

This motion was sustained, and from the judgment of the circuit court, quashing the indictment, the state has prosecuted an appeal in the nature of a writ of error to this court, and assigned errors.

In the view we have taken of this statute, it is only necessary to consider the contention that the statute is arbitrary and vicious class legislation, and a denial of the equal protection of the laws.

It is obvious from a reading of the statute, chapter 208, Acts 1887, that it only includes and applies to corporations created and organized under the laws of Tennessee, and foreign corporations doing business in this state under its laws, and the officers and agents of such corporations. The terms "joint-stock company" and "association" are used as synonymous with the word "corporation," and are surplusage. There are no such corporate bodies as a "joint-stock company" or "association" known to the laws of this state, and it is clear from the whole act that it was the intention of the Legislature to include corporations only, whether domestic or foreign. This is shown by the punishment provided for a corporation violating the act, and that for an officer or agent violating it. Joint-stock companies, associations, and corporations are only punished by fine, because they cannot be imprisoned, while the officer or agent is punished by both fine and imprisonment. If unincorporated bodies were meant by "joint-stock company" and "association," there would not have been this discrimination; but the individuals composing a joint-stock company or association would also have been punished as individuals who are merely officers or agents. Certainly a more severe punishment would not have been denounced against the agent than the principal.

There is no mention in the statute of firms and partnerships, which are composed of individuals associated together for business purposes, or of individuals, and in no view of the statute can it be made to apply to natural persons doing business as partners or individuals. We therefore have a statute which prohibits corporations and their agents from doing certain things under severe penalties, which does not apply to firms or individuals doing the same thing. The discriminatory effect of this statute is illustrated in brief of counsel for the defendant substantially in these words: There is a dry goods mercantile partnership or firm, dealing in dry goods, clothing, boots, shoes, notions, etc., and in the same city a corporation, engaged in precisely the same business and upon the same scale. If the latter should "notify" one of its employees "not to trade" with

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a certain party, under penalty of being discharged, it would be subject to the payment of a fine of from \$100 to \$1,000, under the first section of the act, and the officer or agent of that corporation who should thus notify such employee would be subject, under the third section of the act, to the payment of a fine of \$500, and to imprisonment in the county jail for three months. But if the firm were to say to its employees that they will not retain in their service any one who "trades or deals" with the same person, neither the members of it nor their agents would be subject to the penalties of this act.

The General Assembly undoubtedly has the power, and is not prohibited by the constitutional provisions referred to, from enacting laws containing reasonable and proper classification of the objects of the legislation, but the classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others, should be so preferred or discriminated against. There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification. If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included. If the legislation, without good reason and just basis, imposed a burden upon one class which is not imposed upon others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of an immunity to those not subject to it.

In *Stratton v. Morris*, 89 Tenn. 534, 15 S. W. 95, 12 L. R. A. 70, it is said:

"We conclude, upon a review of the cases referred to, that whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classifications must be natural, and not arbitrary. If the classification is made under article 2, § 8, of the Constitution, for the purpose of conferring some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under article 1, § 8, of the Constitution, for the purpose of subjecting a class to the burdens of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be sub-

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jected to the burden. Another essential to the validity of every legislative classification, whether it be made under article 2, § 8, or under article 1, § 8, is that it must not violate any other provision of the Constitution, whether such provision be expressed or implied."

This is the well-settled rule in this state, and it has often been announced and applied by this court, in many cases to be found in our Reports.

In *Soon Hing v. Crowley*, 113 U. S. at page 709, 5 Sup. Ct. at page 733, 28 L. Ed. 1145, it is said:

"The discriminations, which are open to objection, are those where persons engaged in the same business are subject to different restrictions, or held entitled to different privileges under the same conditions."

In *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 155, 17 Sup. Ct. 257, 41 L. Ed. 666, it is said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for the classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations."

In the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, in which a statute of the state of Illinois was held to be a denial of the equal protection of the laws, on account of arbitrary classification, it is said:

"The difficulty is not met by saying that, generally speaking, the state, when enacting laws, may in its discretion make a classification of persons, firms, corporations, and associations, in order to subserve public objects; for this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that the classification has been made, but also that it is one based upon some good, reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

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In Sutherland on Statutory Construction (2d Ed., by Lewis) vol. 1, p. 366, it is said:

"The fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law; in other words, legislation for a class, to be general, must be confined to matter peculiar to the class."

And at page 369:

"The characteristics, which will thus serve as a basis of classification, must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation."

These authorities are conclusive of this case.

The statute in question applies to all corporations, regardless of the business which they were incorporated and authorized to conduct, whether they be quasi public, as in case of public service corporations, or private corporations, such as those created to conduct a mercantile, manufacturing, or other business, located at one point or extending over many counties, with large or small capital, or having in their service thousands or only a few employees.

It does not apply to natural persons, either as individuals or members of a partnership or firm, engaged in conducting the same business, at the same place, in the same manner, and with similar employees. New burdens and restrictions are placed upon corporations, the property of which belongs to individual shareholders, which are not placed upon natural persons engaged in the same business, conducted in the same way, and at the same place. We can see no good reason or natural and reasonable basis for this discrimination. None has been suggested or can be suggested, for they do not exist. The application of the statute is made to depend solely upon whether the employer is a natural or artificial person, between which, within the protection of the constitutional provisions invoked, there is no distinction. The distinction made is in the character of the employer, and not in that of the employment or business conducted.

We are of opinion that for this discrimination this act is arbitrary and vicious class legislation; that it denies all corporations doing business in Tennessee the equal protection of the laws, and is in contravention of the Constitution of this state and of that of the United States, and void. We do not hold that there may not be a classification of corporations, or of employers, for that question is not here involved. Where such classification is natural and reasonable, and based upon some distinctive difference in the business of the several classes, a difference peculiar to and inhering in its very nature, it is valid, and will be sustained.

Cases in which legislation making such classification has been

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held to be free from constitutional objection are: *Ballard v. Cotton Oil Co.*, 81 Miss. 507, 34 South. 433, 62 L. R. A. 407, 95 Am. St. Rep. 474; *Smith v. L. & N. R. R. Co.*, 75 Ala. 449; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17; *Slocum v. Bear Valley Irrigation Co.*, 122 Cal. 555, 55 Pac. 403, 68 Am. St. Rep. 68; *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 155, 157, 17 Sup. Ct. 255, 41 L. Ed. 666; *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.

We express no opinion upon the other objections made to the statute, as those we have considered are conclusive of the case.

It results there is no error in the judgment of the trial court, and the same is affirmed.

BEAVER COUNTY v. BEAVER VALLEY TRACTION CO.

(Supreme Court of Pennsylvania, Jan. 3, 1911.)

[79 Atl. Rep. 161.]

Street Railroads—County Bridges—Use by Trolley Company—Liability for Rent.—A trolley company operating its street cars over a county bridge enjoys a special use, different in kind and extent from that of the general public, for which the county may exact rent, including therein a reasonable proportion of the costs incurred for necessary repairs to the bridge.

Street Railroads—County Bridges—Use by Trolley Company—Liability for Rent.—Where a county by condemnation obtained bridges used by a trolley company under agreement with the private owners, and the trolley company afterwards contracted with the county for use of the bridges at a certain rental for a term of years, and after expiration of such term continued to use the bridges, but refused to pay rental therefor, the county can recover for such use after termination of the contract period.

Street Railroads—County Bridges—Use by Trolley Company—Compensation—Question for Jury.—In an action by a county against a trolley company for compensation for the use of county bridges, where there was evidence showing the trolley company's system of trackage, the population of the territory it had to draw upon, cost of the respective bridges to the county and their value in the year for which compensation was sought, the amount paid for the repair of ordinary wear and tear incurred during such year, the general cost of maintenance of the bridges during the year, sizes of the bridges, and how they were built, details as to the use made of the bridges by defendant company, and some light on the general use

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as compared to the precise use of the defendant company, the court properly allowed the jury to determine the proper compensation for the use of the bridges.

Appeal from Court of Common Pleas, Allegheny County.

Action by Beaver County against the Beaver Valley Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. W. Irwin, D. A. Nelson, John H. Murdoch, Edgar B. Murdoch, and James A. Wiley, for appellant.

James I. Brownson, A. P. Marshall, and J. L. Holmes, for appellee.

MOSCHZISKER, J. The county of Beaver brought an action against the Beaver Valley Traction Company to recover compensation for the use of three bridges during the year 1908. Judgment was entered upon a verdict for the plaintiff, and the defendant has appealed. These bridges were formerly owned by private corporations, but in the years 1900, 1904, and 1905 they were condemned and taken over by the county. The defendant acquired the right to their use several years prior to the condemnation, but the exact arrangements with the old bridge companies do not appear. The record shows, however: "It is admitted by the plaintiff that, at the time the plaintiff condemned these bridges and took them over and made them county bridges, defendant was lawfully using the bridges in the operation of its street cars, under arrangement theretofore made with the bridge company. It is also admitted that as between the plaintiff and the defendant all matters in regard to the use of these bridges were adjusted up to the beginning of the year 1908." Subsequent to the condemnation the defendant entered into a written contract with the county commissioners concerning the use of the bridges, and the compensation to be paid during the ensuing three years, which contract expired January 1, 1908. After that date the defendant continued to operate its cars across the bridges, but declined to make any further payments to the county.

The defendant contends that, since it was in lawful possession of the bridges at the time of their condemnation, the county took them burdened with its vested franchise and is debarred from charging a rental; again, that since the bridges have been declared free they are simply a part of the public highways, and a right to charge the defendant no longer exists. In the event of these points being decided against it, the defendant then contends that its liability should be limited to the payment of a fair proportion

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of the annual expenses of keeping the bridges in repair; and it maintains that the charge of the trial judge was inadequate, in that no positive rule was laid down concerning the measure of damages.

In considering these contentions it is to be noted that no effort has been made to defeat the defendant's right to use the bridges. The plaintiff concedes that right, but insists upon the payment of a fair compensation for such use. It is further to be noted that the question of the effect of the condemnation proceedings upon any rights accruing under prior contracts between the defendant and the old bridge companies is not in this case. These contracts were ruled out on the objection of the defendant. It affirmatively appears that in 1905 both of the parties to the present controversy treated them as terminated, and entered into a new contract for the term of three years. The expiration of that contract did not leave the bridges free to the defendant; it simply changed the defendant's duty to pay a proper compensation from a contractual obligation to a common-law liability for use and occupation.

The defendant never had a right to the free use of these bridges. It had the right under its charter and the consent of the local authorities to use the public highways, including the bridges; but before it could enter upon the latter it had to gain the consent of the bridge owners, and, if so required, it had to arrange to pay such reasonable compensation, by annual rental or otherwise, as might be agreed upon or fixed by the court. *Berks County v. Reading City Passenger Ry. Co.*, 167 Pa. 102, 31 Atl. 474, 663; *Larue v. Oil City Ry. Co.*, 170 Pa. 249, 32 Atl. 977; *Lawrence County v. New Castle Electric St. Ry. Co.*, 8 Super. Ct. Rep. 313. When the bridges were taken over by the county, the liability of the defendant to pay a rental still continued. *Beaver County v. Central Dist. & Printing Teleg. Co.*, 219 Pa. 340, 68 Atl. 846. The fact that they then became free highways to the general public would not of itself affect the position of the defendant. In this connection see *St. Louis v. Western Union Teleg. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

In the case just cited a charge has been made for the use of certain public streets by the city of St. Louis. The Supreme Court of the United States said: "It is * * * in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. * * * The use made by the telegraph company, is, in respect to so much of its space as is occupied by its telegraph poles, permanent and exclusive. * * * Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for the purposes of highway and personal travel, wholly lost to the public. * * * To that extent it is a use different in kind and extent to that enjoyed by the general public.

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Now * * * is there * * * anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. * * * While permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is giving the exclusive use of real estate, for which the giver has the right to exact compensation, which is in the nature of rental."

In *Beaver County v. Telegraph Co.*, 219 Pa. 340, 68 Atl. 846, we said: "In Pennsylvania bridges are treated as part of the highway. * * * The county owns the bridge and maintains it for the comfort and convenience of the traveling public. * * * It cannot arbitrarily refuse the use of the bridge for purposes which have been lawfully authorized upon the highways. The county commissioners have, however, the right within reasonable limits to regulate the manner in which the bridge may be used, and may provide for its repair, and require compensation by way of rental. * * * The telegraph company laid its line upon the bridge under agreement with the corporation that was then its owner. It was rightfully, upon the structure when it became a county bridge. * * * It is the right of the plaintiff to bring an action at law to recover damages for the use of the bridge during the time for which no compensation has been paid."

In this last case we further said: "We can see no difference in principle between the use made of a bridge by a street railway company and that which is appropriated by the telephone company." So far as it concerns the point we now have, and then had, under consideration, there is no difference. The traction company, defendant in this case, and the telegraph company referred to in that case each enjoyed a special use, different in kind and extent from that of the general public. Here the defendant not only used the bridges as ways of passage for their cars, but it permanently occupied certain spaces by its tracks, poles, and wires. It is not asked to pay toll in the popular sense in which that term is generally understood, but it is required to pay a rental for its special use and occupation of the bridges. We conclude that, even though no tolls were collected from the general public, the county had the right to insist upon the payment of a rental by the defendant company, and to include therein a reasonable proportion of the costs incurred for necessary repairs to the bridge structures.

In a case like this, it is exceedingly difficult to state any exact rule as to the measure of damages. There was evidence showing defendant's system of trackage and the population of the territory it had to draw upon; the cost of the respective bridges to the county, and their value in 1908; the amount paid for the repair of ordinary wear and tear incurred during 1908, and also the general cost of the maintenance of the bridges during that year;

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the sizes of the bridges and how they were built; details as to the use made of the bridges by the defendant company, and some light on the general public use as compared to the precise use of defendant company. With this evidence in view, the trial judge said to the jury: "It (the county) has declared simply for the use and occupancy of the bridges during the year of 1908; the repairs for ordinary wear and tear have been paid by it and none of them by the company. These repairs are to be considered as an element to increase the rental. The county sues for the use and occupancy of the bridges with the understanding that it has made the necessary repairs, and, of course, that would make the rental value of the bridges larger. * * * We have narrowed down the contention between the parties to this: 'What is a fair compensation to the county of Beaver for the use of these three bridges by this traction company during the year 1908, taking into consideration the fact that the county paid all the repairs for the ordinary wear and tear of that bridge necessary for and chargeable to that year?'" The court called attention to the several points upon which there was evidence tending to throw light upon the question of the damages, and then said: "It will be for you, * * * taking all those things into consideration, taking into consideration that the law is that the ordinary wear and tear repairs of a county bridge, occupied jointly as these bridges were, ought to be shared by the two occupants in proportion (as near as possible) to the relative use that they make of it. Now, taking these things into consideration, and the admitted fact that the defendant company has used this road for the year 1908, try and get together on what is fair to both parties; * * * and then return the amount of compensation in dollars and cents, which you believe the plaintiff is entitled to for the use and occupancy of the three bridges during the year 1908."

We are not convinced of any reversible error in this charge. No requests for special instructions on the measure of damages were handed to the trial judge, and he covered the subject as clearly as could be required under the circumstances. It was for the jury, in the exercise of their best judgment, to determine upon all the evidence what would be fair and proper compensation for the railway company to pay for its use of the bridges during the year 1908, and we cannot say that their verdict is not sustained by the evidence.

The assignments of error are all overruled, and the judgment is affirmed.

BEDFORD QUARRIES CO. et al. v. CHICAGO, I. & L. RY. CO.

(Supreme Court of Indiana, March 7, 1911.)

[94 N. E. Rep. 326.]

Eminent Domain—Public Nature of Use—Railroads.*—The question whether land condemned for a railroad right of way is for a public use does not depend on the amount of business or the number of shippers, but on the right of the public to derive benefit from the proposed track.

Eminent Domain—Public Use—Evidence.*—Evidence, in proceedings to condemn land for a right of way for an industrial side track, held to show that the proposed track would be available to the public and subject to public control as other railroad tracks, and would serve the public good, so that the use was a public one.

Eminent Domain—Defenses.—A landowner cannot object to the condemnation of land for the extension of an industrial switch, on the ground that the company has not yet acquired intervening property needed to connect the proposed switch with the main line; it having by the instrument of appropriation pledged that the switch would be connected with the main line and used for the public service.

Eminent Domain—Proceedings—Instruction.—Burns' Ann. St. 1908, §§ 929-940, relating to condemnation proceedings, do not require the court to instruct the appraisers appointed as to their duties, or to give instructions requested by the parties, so that it is not reversible error to refuse to do so, since either party, if not satisfied with the award, may, under section 936, file exceptions to the appraisers' report and demand a trial, as in other civil actions in which the giving and refusing of instructions may be relied upon.

Appeal and Error—Waiver of Error—Briefs.—Error in overruling a motion to set aside the service of process, and in overruling a motion for a continuance, is waived and will not be reviewed, where neither the motions nor the affidavits in support thereof, nor their substance, are set forth in appellant's brief, as required by Supreme Court rule 22 (55 N. E. v).

Appeal from Circuit Court, Lawrence County; J. B. Wilson, Judge.

Proceedings by the Chicago, Indianapolis & Louisville Railway Company against the Bedford Quarries Company and others, to condemn land for right of way purposes. From interlocutory order appointing appraisers, defendants appeal. Affirmed.

W. T. Abbott and Brooks & Brooks, for appellants.

E. C. Field and H. R. Kurrie, for appellee.

*See foot-note of Dubuque, etc., R. Co. v. Ft. Dodge, etc., R. Co. (Iowa), 36 R. R. R. 292, 59 Am. & Eng. R. Cas., N. S., 292.

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MONKS, J. This proceeding was brought by appellee, a railroad company organized under the laws of this state, against the Bedford Quarries Company, the owner of certain real estate, and the Cleveland Trust Company, trustee, as the owner and holder of a mortgage on said real estate, to appropriate a right of way across said real estate for the construction of a side track thereon from appellee's main line to lands containing building stone. The proceeding was brought under an "act concerning proceedings in the exercise of eminent domain," approved February 27, 1905. Acts 1905, pp. 59-64; Acts 1907, p. 306, being sections 929-940, Burns 1908. Appellants each filed 16 objections to said proceeding. The court heard the evidence and overruled each of said objections, and appointed appraisers under said act of 1905. From said interlocutory order appointing appraisers, appellants appealed to this court under section 5 of said act, being section 933, Burns 1908.

It appears from the record that there is a side track connecting with appellee's main line, extending west for a distance of about a mile into the property of a stone quarry company. This side track is being used by appellee in hauling all kinds of freight to and from the stone quarry at which it ends, as well as other freight which is offered them from time to time. From 30 to 40 car loads of stone are handled a day during the quarrying season. They also handle shipments of wood and stone; also coal and machinery inbound, consigned to the Perry-Mathews-Buskirk Stone Company, the Ohio & Western Lime Company, and the Furst-Kerber Stone Company. Appellee handles, as a common carrier, freight offered by any one on said side track. The proposed side track connects with the one mentioned at a point about 3,400 feet from the main track, and runs thence in a northerly direction about 6,000 feet, over the lands of the Bedford Quarries Company, appellant, and the lands of other persons, to the lands owned by the Furst-Kerber Stone Company.

Appellants insist that this proceeding cannot be maintained, because it is an attempt to appropriate lands by a railroad for a private purpose, and not for a public use.

Railroad companies organized under the laws of this state are authorized to take, by condemnation proceedings, lands necessary for their tracks, side tracks, switches, "depots, and other accommodations necessary to accomplish the objects for which the corporation was created." Sections 5192, 5195, 5236, Burns 1908; Acts 1905, pp. 59-64, being sections 929-940, Burns 1908.

It was said by the court, in *Southern Pine Fibre Co. v. North Augusta Land Co.* (C. C.) 50 Fed. 26, on page 27: "The term 'side track' has a well-known signification. It means connection with some railroad affording communication with market." There is a sharp conflict of authority as to whether switch, spur, and side tracks to private property are a public use for which prop-

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erty may be condemned. There are numerous cases, however, which hold that such tracks may be built for the purpose of reaching a coal mine or a manufacturing establishment, and that the same is a public enterprise for which the power of eminent domain may be used, provided the public has the right to use such tracks. "The right of the public to use such track makes the use thereof public. Such tracks seem a proper mode of making the facilities of the railroad available and open to all who are so situated as to be able to use them upon equal terms. There is no sound reason why they should not be regarded as a public use." *Wolfard v. Fisher*, 48 Or. 479, 84 Pac. 850, 87 Pac. 530, 7 L. R. A. (N. S.) 991, 997, and cases cited; *Kettle, etc., R. Co. v. Eastern, etc., R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Morrison v. Thistle Coal Co.*, 119 Iowa, 705, 94 N. W. 507; *De Camp v. Hibernia, etc., R. Co.*, 47 N. J. Law, 43; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. Law, 518, 4 Atl. 318, 54 Am. Rep. 197; *Hays v. Risher*, 32 Pa. 169; *Hairston v. Danville, etc., Co.*, 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637; *St. Louis, etc., R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 440, and note; *Roberst v. Williams*, 13 Ark. 43, 49; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60; *South Chicago, etc., R. Co. v. Dix*, 109 Ill. 237; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *McGann v. People*, 194 Ill. 526, 62 N. E. 941; *People v. Blocki*, 203 Ill. 363, 67 N. E. 809; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27; *Hurd v. Atchison, etc., R. Co.*, 73 Kan. 83, 84 Pac. 553; *Kan., etc., R. Co. v. La Western R. Co.*, 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512; 7 Am. & Eng. Ann. Cas. 831; *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440, 22 Atl. 373; *Ulmer & Lime Rock R. Co. v. Lime Rock Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387; *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co.*, 72 Mich. 206, 40 N. W. 436; *Minneapolis, etc., R. Co. v. Nicolin*, 76 Minn. 302, 79 N. W. 304; *Liedel v. No. Pac. R. Co.*, 89 Minn. 284, 94 N. W. 877; *Roby v. State*, 76 Neb. 450, 107 N. W. 766; *Clark v. Blackmar, etc., R. Co.*, 47 N. Y. 150; *Corporation Commission v. Seaboard, etc., R. Co.*, 140 N. C. 239, 52 S. E. 941; *State v. Toledo, etc., R. Co.*, 1 Ohio Cir. Ct. R. (N. S.) 513; *Stockdale v. Rio Grande, etc., R. Co.*, 28 Utah, 201, 77 Pac. 849; *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805, and note; *State v. Superior Court*, 42 Wash. 675, 85 Pac. 669; *Chicago, etc., R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918, and note; *Caretta, etc., R. Co. v. Virginia, etc., Coal Co.*, 62 W. Va. 185, 57 S. E. 401; *Butte, etc., R. Co. v. Montana, etc., R. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Rochester, etc., Co. v. Berwind-White, etc., Co.*, 24 Pa. Co. Ct. R. 104; *Robins v. Western, etc., R. Co.*, 31 Pitts

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Leg. J. (N. S.) 181; *State v. Toledo, etc., R. Co.*, 24 Ohio Cir. Ct. R. 321, and cases cited; *Mull v. Indianapolis, etc.*, 169 Ind. 214, 220, 81 N. E. 657; *Sexauer v. Star, etc.*, 173 Ind. 342, 90 N. E. 474, 26 L. R. A. (N. S.) 609; *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 38 Ind. App. 234, 70 N. E. 843; 1 *Lewis on Eminent Domain* (3d Ed.) pp. 532, 534, and notes; *Nichols on Power of Eminent Domain*, § 221; 10 *Am. & Eng. Encyc. of Law* (2d Ed.) 1078, 1079; 15 *Cyc.* 590, 591; 2 *Elliott on Railroads* (2d Ed.) § 961, on page 515.

The character of the use in the case of a railroad or railroad track does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have the right to use it, it is a public interest, although the number who require its use may be small. *Chicago, etc., R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *De Camp v. Hibernia, etc., R. Co.*, 47 N. J. Law, 43; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. Law, 518, 4 Atl. 318, 54 Am. Rep. 197.

It has been held that "there may be a grant to private individuals of the right to lay tracks in the streets connecting with the public railroad tracks previously laid and extended to the manufacturing establishments of those laying the tracks, but in such cases the tracks so laid become in legal contemplation, to all intents and effect, tracks of the railroad with which they are connected, open to the public use and subject to the public control in all respects as other railway tracks are open to public use." *South, etc., R. Co. v. Dix*, 109 Ill. 237; 17 *Am. & Eng. R. Cas.* 157.

It is said in 2 *Wood on Railroads* (Minor's Ed. 1894) at page 828: "To deny a petition of a railway company for the condemnation of land for a side track, it should appear that the object thereby sought is clearly an abuse of power, and a taking of private property for an object not required for the convenient operation of the road. *Matter of Boston, etc., R. Co.*, 53 N. Y. 574; *New York, etc., R. Co. v. M. G. & L. Co.*, 63 N. Y. 326; *Chicago, etc., R. Co. v. Lake*, 71 Ill. 333; *Smith v. Chicago, etc., R. Co.*, 105 Ill. 511; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *In re New York, etc., R. Co.*, 77 N. Y. 248; *South Chicago, etc., R. Co. v. Dix*, 109 Ill. 237.

"The running of a side track by a railroad company to a private manufacturing establishment, to connect the business of such establishment with the main line of the railroad, is a public use for which land may be appropriated. These establishments are very numerous, especially in Pennsylvania, along and near lines of railroad. They serve to develop the resources of the state; they give employment to vast numbers of citizens, and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheap-

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ness of transportation are in most cases essential, and in many vital, to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them, and in that which comes from them. Hence they cannot be regarded as merely private interests, and therefore without the pale of that public use for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes." Getz's Appeal, 3 Am. & Eng. Ry. Cas. 186.

It is said in 15 Cyc. pp. 590, 591: "Spur or switch tracks necessary to the proper operation of the main line of a railroad, or which may be necessary to connect important industries or even a single industry with the main line or other public highways, provided, however, the general public has the right to use it, although it may also subserve a private interest, is a public use for which private property may be taken under the power of eminent domain." South Chicago, etc., R. Co. v. Dix, 109 Ill. 237; Lower v. Chicago, etc., R. Co., 59 Iowa, 563, 13 N. W. 718; Toledo, etc., R. Co. v. Daniels, 16 Ohio St. 390; St. Louis, etc., R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; Morrison v. Thistle Coal Co., 119 Iowa, 705, 94 N. W. 507; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Farnsworth v. Lime Rock R. Co., 83 Me. 440, 22 Atl. 373; New Central Coal Co. v. George Creek Coal Co., 37 Md. 537; Toledo, etc., R. Co. v. East Saginaw, etc., R. Co., 72 Mich. 206, 40 N. W. 436; Chicago, etc., R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Kettle River Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, 117.

In 2 Elliott on Railroads (2d Ed.) it is said, on page 515: "And the weight of authority, as well as the better reason, seems to be the effect that lines of railroad, branches or spurs to mines, manufacturing establishments, and the like are a public use for which land may be condemned, where the general public have the right to use them or to be served without discrimination."

"The very fact that condemnation is necessary in order to establish them shows that they are capable of being used by more than one." Lewis on Eminent Domain (3d Ed.) p. 533.

It is evident from what we have said and the authorities cited that the proposed side track when constructed will be open to the public use, and subject to public control in all respects as its other tracks are open to public use. Said side track will be open to all who are so situated as to be able to use it upon equal terms, and must therefore be regarded as a public and not a private use. The proposed side track is not to be constructed for the sole purpose of furnishing an outlet for the business of one quarry. It is the extension of a track now reaching a quarry which is putting out 40 or 50 car loads of stone a day. It is to be constructed over land which is underlaid with a good quality of building stone, which can only be marketed by having a railroad track

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built upon and across the same. It comes up very near to a town or village of three or four hundred people, and reaches a locality where there is a great quantity of timber and other freight to be moved.

According to the estimate of one witness, there are three or four car loads a day which can and will be handled from the business of three quarries now existing along the old side track and the one proposed. Appellant seems to be a rival quarrying company with the Furst-Kerber Company. The Furst-Kerber Company has developed the land to the north of the land of appellant. It now has 75 or 100 car loads of stone piled up, which must remain there unmoved until side track facilities can be had. The public generally is interested in these quarries being opened, and this stone land being developed; the country at large in the price of stone, and the particular locality in the development of the resources of the county. Appellee has a main line of railroad built through that territory which is naturally expected to serve that locality, and it is a part of its business to provide such facilities as must be had, in order for this business to be accommodated.

It is insisted, however, by appellant that the side track with which the proposed side track is to be connected "is a private railroad built for the exclusive use of appellants' predecessor, and cannot be used by appellee for public business as a common carrier, or for the use of another shipper without the consent of appellant, or unless the right is appropriated by law." The evidence shows that a contract was entered into in 1884, which provided that said track should not be used by other persons "to transport stone or materials used in the construction or operation of stone quarries without the consent of the Bedford Quarries Company's predecessor." It would seem that the public duty of appellee to use its facilities for the benefit of all would make such provision in the contract void. *Chicago, etc., R. Co. v. Southern Ind. R. Co.*, 38 Ind. App. 234, 70 N. E. 843. There is nothing, however, to show that the contract is in effect, and the evidence shows that said side track is being used by appellee in handling any and all business which can be carried on the same. Appellant, however, cannot in this case object to appellee condemning its property, on the ground that it had not yet acquired the intervening property needed to complete the track and connect it with the main line. It is sufficient in this case that appellee has by its instrument of appropriation pledged that its track would be connected with the main line, and form a part of its railroad facilities, and be used in its public service.

It is next insisted that the court below erred in refusing to instruct the appraisers as to their duty, and in refusing to give them the written instructions requested by appellants. There is nothing in the statute requiring the court to instruct the apprais-

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ers appointed, in proceedings like this, or to give any instructions requested by either of the parties. While it may not be error to correctly instruct the appraisers as to their duties, it is not reversible error to refuse to do so. Either party, if not satisfied with the award, may, under section 936, Burns 1908, file exceptions to the report of the appraisers, and have a trial thereof, as in other civil actions in which the giving and refusing to give instructions may be questioned by a motion for a new trial, and on appeal by errors properly assigned.

The Cleveland Trust Company contends that the court erred in overruling its motion to set aside the service of the process upon it, and in overruling its motion for a continuance, which motions were founded upon affidavits. Neither said motions nor the affidavits in support of the same, nor the substance thereof, are set out in appellants' brief, as required by rule 22 of this court (55 N. E. v). Said questions are therefore waived, and cannot be considered. *Town of Jasonville v. Humphreys*, 170 Ind. 583, 84 N. E. 340, and cases cited; *Chicago, etc., R. Co. v. Walton*, 165 Ind. 253, 74 N. E. 1090, and cases cited.

The interlocutory order appointing appraisers is affirmed.

POWELL v. HOUSTON & T. C. R. Co.

(Supreme Court of Texas, March 29, 1911.)

[135 S. W. Rep. 1153.]

Eminent Domain—Damage to Property—Question for Jury.—Const. art. 1, § 17, provides that no person's property shall be damaged for public use without adequate compensation. A railroad was constructed across a city street about 200 feet from plaintiff's lot abutting thereon, and upon which he operated a store. The railroad raised its grade about 2 feet, and obstructed the crossing, and delayed the completion of the work, by which the travel of persons over the street from points beyond the track was interrupted, and the alteration impaired the access to and from his property by persons who would have traded with him, whereby the value of his property was diminished. Held, that the court did not err in submitting to the jury the issue of damage to the property and to the trade of plaintiff.

Eminent Domain—"Damage" to Property—Access and Egress.*—The ownership of a lot abutting on a street carries with it as property the right of unimpaired access and egress, and whatever impairs that right and causes a depreciation in the value of the lot constitutes damage within the meaning of Const. art. 1, § 17.

Eminent Domain—Damage to Property—Railway Crossings—Changing Grade—Location of Property.*—In an action for damages for obstructing a street in raising a grade of a railroad crossing, it is not necessary that the obstruction should be in front of or near to the plaintiff's property, but the test of the right to recover is what effect does the crossing and condition in which it was have upon the value of the plaintiff's property, and upon the exercise of his right to ingress and egress.

Eminent Domain—Damage to Property—Loss a Peculiar One.†—In an action for damages for raising of a grade of a railroad and

*For the authorities in this series on the subject of the right of property owners to recover damages on account of the obstruction of egress and ingress caused by the construction or operation of a railroad, see first foot-note of *Lund v. Idaho & W. N. R. R.* (Wash.), 31 R. R. R. 104, 54 Am. & Eng. R. Cas., N. S., 104.

For the authorities in this series on the question what are, and are not, the elements of legal damages sustained by abutting owners from the construction or operation of railroads in streets, see foot-note of *Morris v. Oregon S. L. R. Co.* (Utah), 33 R. R. R. 436, 56 Am. & Eng. R. Cas., N. S., 436; foot-note of *Hutcheson v. International & G. N. R. Co.* (Tex.), 33 R. R. R. 105, 56 Am. & Eng. R. Cas., N. S., 105.

†For the authorities in this series on the questions whether a property owner's right to recover for injuries from the construction or operation of a railroad depends upon whether such injuries are peculiar to his property, and what are, and are not such injuries, see extensive note, 15 R. R. R. 541, 38 Am. & Eng. R. Cas., N. S., 541;

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obstructing the crossing, that the injury was common to all other property fronting on the street will not bar plaintiff's right of recovery for loss peculiar to plaintiff's property and not what he suffers in common with the community.

Eminent Domain—Damages—Changing Grade—Question for Jury.

—In an action against a railroad company for obstructing a street crossing and raising a grade, where the plaintiff testified that his property before the change was worth \$1,300, and after the grade had been so changed, and up to the time of the trial, it was worth one-third less, it was sufficient evidence to go to the jury on the question of damage to the lot.

Eminent Domain—Damages—Profits from Trade.—In an action for damages for raising a grade and obstructing a street, where plaintiff testified as to the volume of trade which he had before the grade of the street was interfered with, and the volume he did while the crossing was obstructed, and also since it had been opened, and the average per cent. of profit that he made on goods sold, and that he had many customers from the opposite side of the railroad track, who had previously come to his store, and that while the obstruction existed many of them did not visit him, and that he had customers upon the opposite side of the track to whom he delivered articles upon order, and the condition of the crossing made his access to those customers more difficult, a jury might with reasonable certainty ascertain the damage done.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by S. W. Powell against the Houston & Texas Central Railroad Company. From a judgment of the Court of Civil Appeals (125 S. W. 330) reversing a judgment for plaintiff, plaintiff brings error. Reversed, and judgment remanded to the District Court for another trial.

Treadwell & Tarver and *Richard Mays*, for plaintiff in error.

Baker, Botts, Parker & Garwood, *R. S. Neblett*, and *R. R. Owens*, for defendant in error.

Longenecker v. Wichita R. & L. Co. (Kan.), 34 R. R. R. 610, 57 Am. & Eng. R. Cas., N. S., 610 (injury from construction and operation of railroad in street was peculiar to plaintiff's property); *Ft. Collins, etc., Ry. Co. v. France* (Colo.), 29 R. R. R. 396, 52 Am. & Eng. R. Cas., N. S., 396 (abutter is not entitled to damages on account of location of railroad viaduct near his property, merely on the ground that he uses the street at such point more frequently than other people); *Stockdale v. Rio Grande W. Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527 (losses and inconveniences from the construction and operation of railroad in street, which are merely those suffered in common with the general public, do not entitle a property owner to compensation); *Smith v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 457, 37 Am. & Eng. R. Cas., N. S., 457 (what constitute special damages from construction of railroad in street recoverable by abutting owner).

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BROWN, C. J. We copy this statement of the evidence from the opinion of the Court of Civil Appeals:

"The evidence shows that appellee owned a lot of land on the south side of First avenue, about 200 feet east of where the railroad crossed First avenue; said crossing being just west of Seventh street. Appellant, in attempting to comply with the Texas Railroad Commission's order to so construct its track that the Trinity & Brazos Valley Railway, which ran along Sixth street, just east of appellee's store, could cross under appellant's track at a point a short distance north of First avenue, raised its track across First avenue to a height that rendered said street at said point practically impossible for travel and stopped work thereon for several months. During this time the city placed obstructions at said point which deterred any person from attempting to cross at said point. First avenue was a regular thoroughfare for persons entering the city from the north and northeast. The main business section of the city is on Beaton street, and First avenue intersects Beaton street about two blocks north of where said business section begins. To reach the business section of said Beaton street, it is as near for parties coming into the city from the north and northeast to leave First avenue at First or Seventh streets, go down to Second or Third avenues, and thence to Beaton street, as it is to travel First avenue to Beaton street, thence to the business section. Travel was diverted at Fifth avenue, thence down said avenue to Second avenue, thence diagonally across one block to Third avenue, thence to Beaton street. The appellant's right of way is immediately west of Seventh street.

"Appellee's store abutted on First avenue, which was obstructed by the appellant some 200 feet west from said store; but the street in front of said store and ingress and egress to and from the store was not interfered with, further than the free passage along said street at the point of obstruction. There was a street immediately west of the block in which appellee's premises were situated, and between the obstruction and said premises, and this and other streets running north and south and east and west, all open to travel, which gave him that section free access to all parts of the city, and the only interference, as before stated, to travel was the obstruction on First avenue caused by appellant, and this obstruction did not increase the distance to the main part of town for the appellee or those living in that section, nor those living in the country to the north and northeast. The obstruction only caused an inconvenience in reaching that portion of First avenue lying west of the obstruction to those living east thereof, and they were only inconvenienced by having to travel the distance of around one block."

We add to the statement as made by the Court of Civil Appeals that the plaintiff below alleged in his petition that the

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work was prolonged an unreasonable time, beyond what was necessary to do it, during which time the crossing was impassable, which caused damage to his business. He testified to facts from which a jury might have concluded that his trade was greatly lessened, causing damage. Plaintiff testified that before the raising of the grade his property was worth \$1,300, and since that crossing was raised it was worth one-third less.

Article 1, § 17, of our state Constitution as it is applicable to the facts of this case may be read thus: "No person's property shall be * * * damaged for * * * public use without adequate compensation being made, unless by the consent of such person." Does the evidence show such damage to the plaintiff's property as comes within the protection of the above section of the Constitution? We condense and restate the facts which the evidence tends to establish. The railroad was constructed and operated across a street in the city of Corsicana about 200 feet from a lot abutting on that street which plaintiff owned and upon which he had a storehouse where he transacted his business as a merchant. [1] Under a contract with the Brazos Valley Railroad, approved by the Railroad Commission, the defendant in error raised its grade at that point about two feet, and thereby obstructed the crossing for a time, and that it unnecessarily delayed for several months the completion of the work by which the travel of persons over the said street from points beyond the railroad track was interrupted, which travel would have come to the store of the plaintiff in error for the purpose of trading with him. The alteration of the said grade by raising it two feet higher made it more difficult to cross and impaired the plaintiff's right of access to and from his property by persons who would have traded with him and who had been trading with him, whereby the value of his property was diminished in the amount alleged in the petition. The change in the grade is permanent, and whatever effect it had upon the property of the plaintiff is permanent in its nature.

[2] The ownership of the lot abutting upon the street carried with it as property the right of free and unimpaired access thereto and egress therefrom, and whatever impaired that right and caused a depreciation of the value of the lot constituted damage to the lot within the meaning of the Constitution. *O'Brien v. Central Iron Co.*, 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508, 92 Am. St. Rep. 305; *G., C. & S. F. R. R. Co. v. Fuller*, 63 Tex. 467.

[3] It was not necessary that the obstruction should be in front of or near to the plaintiff's property, but the test of the right to recover in this action is: What effect did that crossing and the condition in which it was have upon the value of the plaintiff's property and upon the exercise of his right of egress and ingress?

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"The conclusions thus stated in the first edition have been verified by numerous decisions since rendered, and, we believe, without any material dissent, except in the case of Missouri, as shown below. If a street or public way communicating with the plaintiff's premises is obstructed elsewhere than in front of the plaintiff's property, as by a viaduct or bridge, or approach thereto, or by a railroad crossing a street in a cut or on an embankment, or otherwise, and the result of such obstruction is to render such property less valuable either to sell or to use, then the property is damaged, and compensation may be recovered to the extent of the depreciation." Lewis on Eminent Domain, par. 354, p. 646. The above extract from that excellent writer is supported by many authorities, of which we cite these: *Rigney v. Chicago*, 102 Ill. 64; *Coker v. A., K. & N. Ry. Co.*, 123 Ga. 483, 51 S. E. 481; *Highbarger v. Nilford*, 71 Kan. 331, 80 Pac. 633; *Dantzer v. Ind.*, etc., R. R., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. Rep. 343; *Cooper v. Dallas*, 83 Tex. 242, 18 S. W. 565, 29 Am. St. Rep. 645; *G., H. & W. Ry. Co. v. Hall*, 78 Tex. 175, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42.

There can be no doubt, under these authorities and the facts of this case, that a jury might find that there was damage caused by the crossing to the property and to the trade of the plaintiff in error. But the Court of Civil Appeals placed their decision upon the additional ground that the depreciation in the value of the lot, by reason of the condition of the said crossing, is such as was suffered by all others owning property in his vicinity. This proposition can best be answered by quoting from *Railway Co. v. Goldberg*, 68 Tex. 688, 5 S. W. 826, as follows: "The fact that the injury was common to all other property holders on the street would not bar the plaintiff's right of recovery. The plaintiff sues for a special damage to his own property by reason of defendant's having impaired the use of the street upon which it fronts. It does not affect his right to recovery that the owners of property fronting on the same street have been injured in the same manner. [4] This is a loss peculiar to plaintiff's property, and not one he suffers in common with the community generally where the property is situated. *G., C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467."

The law is so clearly stated by Judge Gaines in the above extract that we are unable to add any force to the reasoning which supports the conclusion announced. The depreciation of the value of the lot which belonged to Powell does not affect others who might own property in the same neighborhood, neither does the depreciation in the value of the property of others affect Powell. Therefore the injury suffered by Powell is special and personal to himself and does not come within the rule which is invoked by the Court of Civil Appeals.

[5] In addition to the statement of the Court of Civil Ap-

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peals, the plaintiff testified that his property before the change in the grade in the street was worth \$1,300, and after the grade had been so changed and up to the time of the trial it was worth one-third less than that sum. This was sufficient evidence to go to the jury on the question of damage to the lot and which was submitted by the court to the jury in a charge fair and just to the defendant. [6] Plaintiff also testified as to the volume of trade which he did before the time the grade of the street was interfered with and the volume of trade that he did during the time that the crossing was obstructed, also since it had been opened. He also testified to the average per cent. of profit that he made on the goods sold. He stated that he had many customers from different directions from the opposite side of the railroad track who had previously come to his store over the street on which this obstruction now exists, and that during the time the obstruction existed many of those customers did not visit him as they did before. He also stated that he had customers on the opposite side of the railroad track to whom he delivered articles upon order, and that the condition of the crossing made his access to those customers much more difficult than it was previously. It would be quite difficult to prove with any degree of certainty the damages which might arise from the interference with trade under circumstances such as are shown in this case; but the evidence is such that a jury might with reasonable certainty ascertain the damage done. We therefore hold that the trial court did not err in submitting to the jury the issue of damage to the property and to the trade of plaintiff, and that the Court of Civil Appeals erred in reversing and rendering the judgment in this case.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the cause be remanded to the district court for another trial.

STATE OF OKLAHOMA, ON THE INFORMATION AND RELATION OF CHARLES WEST, Attorney General, Complainant *v.* GULF, COLORADO, & SANTA FE RAILWAY COMPANY; Atchison, Topeka, & Santa Fe Railway Company; St. Louis, Iron Mountain, & Southern Railway Company; St. Louis & San Francisco Railway Company; Missouri, Kansas, & Texas Railway Company; Midland Valley Railway Company; Kansas City Southern Railway Company; Missouri, Oklahoma, & Gulf Railway Company; Fort Smith & Western Railway Company; Arkansas & Western Railway Company; Oklahoma Central Railway Company; Poteau Valley Railroad Company; Chicago, Rock Island, & Pacific Railway Company; Adams Express Company; American Express Company; Pacific Express Company; United States Express Company; and Wells Fargo Express Company, Defts.

(Argued February 24, 1911. Decided April 3, 1911.)

[31 Sup. Ct. Rep. 437.]

Courts—Federal Supreme Court—Original Jurisdiction—Suit by State—Enforcement of Criminal or Penal Laws.—The Federal Supreme Court cannot take original jurisdiction of a suit by a state against persons or corporations of other states, where such suit, though in the form of a civil action is, in its essential character, one to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors.

Courts—Federal Supreme Court—Original Jurisdiction—Suit by State—Interest in Suit.—A state may not invoke the original jurisdiction of the Federal Supreme Court by suit on its behalf against persons or corporations of other states, where the primary purpose of the suit is to protect its citizens generally against the violation of its laws by the corporations or persons sued.

Original bill in equity, brought by the State of Oklahoma to enjoin persons and corporations of other states from violating the penal or criminal laws of the state against traffic in intoxicating liquors. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Charles West and E. G. Spilman, for complainant.

Messrs. Lawrence Maxwell, S. T. Bledsoe, Robert Dunlap, Gardiner Lathrop, J. R. Cottingham, C. O. Blake, R. A. Kleinschmidt, Aldis B. Browne, Martin L. Clardy, W. F. Evans, C. C. Calhoun, Joseph M. Bryson, Clifford L. Jackson, James Hagerman, William R. Allen, Samuel W. Moore, Alexander Britton, Charles E. Warner, M. L. Bell, E. B. Peirce, Joseph W. Welsh, T. B. Harrison, Jr., Carter, Ledyard, & Milburn, Joseph

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S. Graydon, James L. Minnis, William W. Green, Charles W. Stockton, and Alexander & Green, for defendants.

MR. JUSTICE HARLAN delivered the opinion of the court:

The state of Oklahoma, by the present suit, invokes the original jurisdiction of this court for its protection against certain acts, alleged to have been done or threatened to be done by the respective defendants in derogation of its rights as a state. The case has been heard upon demurrers filed by the several defendants. Some of the demurrers proceed upon the specific ground that this court cannot take jurisdiction of the cause, while others add the general ground that the bill does not show any facts entitling the state to the relief sought by the bill.

As the case involves some questions of a grave character, it is proper to set forth with some fullness the grounds upon which the state bases its claim for relief.

It is alleged in the bill that the defendant companies are corporations of states other than Oklahoma, except that the American Express Company is a partnership, composed of individuals who are citizens and residents of New York; that what were formerly the territory of Oklahoma and the Indian territory constitute the present state of Oklahoma; that the lands in the Indian territory, owned by various Indian tribes, were, by agreement or treaties with the United States, to be allotted in severalty among the members of such tribes, with certain exceptions named in the treaties, which it is not necessary to set out here; that by said agreement or treaties the United States agreed to maintain strict laws in said territory, particularly in the allotted lands, against the introduction, sale, barter, or the giving away of liquors and intoxicants of any kind or quality; and that, pursuant to said agreement and treaties, Congress, by the act of June 16th, 1906 (34 Stat. at L. 267, chap. 3335), § 3, made it a condition of the admission of Oklahoma into the Union as a state that it should provide by its Constitution that "the manufacture, sale, barter, giving away, or otherwise furnishing, except as therein provided, of intoxicating liquors within those parts of the proposed state then known as the Indian territory and the Osage Reservation, and within any other parts of the proposed state which existed as an Indian reservation on the 1st day of January, 1906, should be prohibited for twenty-one years from the date of the admission of the state into the Union, and that in said act no reservation or exception was made whereby any one of the defendants might import into the said named portion of said state, or in any other manner furnish, any intoxicating liquors whatsoever, and the power to regulate interstate commerce in intoxicating liquor was thereby surrendered to the state of Oklahoma as to said portions of said state; and by the said act it was not provided that intoxicating liquor should be

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furnished to any person in what was formerly the Indian territory, including the Osage Reservation and any other parts of the state which existed as Indian reservations on the 1st day of January, 1906, in the manner and form that the same is now furnished and imported by said defendants, as hereinafter more fully set forth, or in any other manner or form."

The bill also alleged that, by ordinance irrevocable, Oklahoma had accepted the terms and conditions of the act of June 16th, 1906, including the provisions relating to intoxicating liquors; and thereby the state was obligated in place of the United States, so far as the power was lodged in it, to carry out the treaty and agreements made with the said Indian tribes against the introduction, sale, or in any manner the furnishing, of intoxicating liquors in what was formerly the Indian territory; but that defendants, in violation of the law and the rights of said Indian tribes therein, and to the injury of the state of Oklahoma and its inhabitants, have, since November 16th, 1907, and up to this time, continuously violated all said provisions against furnishing, carrying, and conveying beer, ale, wine, and intoxicating liquors into Indian territory; that such violation of law deeply injures and irreparably destroys the good citizenship and property of the state and its inhabitants, and the defendants threaten to continue the same unless restrained; and that in continuing so to do, the defendants and each of them have committed acts that amount to the surrender and abandonment of their corporate right to be engaged and doing business in interstate commerce between the states, and against such acts the plaintiff has no adequate remedy according to the course of the common law.

The state also complains that various persons, about two hundred in number, within its limits (the names of such persons being all set forth in a list made part of the bill), have made payment of the special tax required of liquor dealers under the laws of the United States; that by the above act of Congress of June 16th, 1906, it was made a condition precedent to the admission of Oklahoma into the Union that, "in its Constitution, it should provide that the payment of the special tax required of liquor dealers by the United States, of any person within those parts of the proposed state then known as the Indian territory and the Osage Reservation, and within any other parts of said proposed state which existed as Indian reservations on the 1st day of January, 1906, should constitute prima facie evidence of the intention of such persons to violate that provision of the act of June 16, 1906, in reference to the prohibition of the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors which it was provided as a condition precedent that the Constitution of said proposed state should provide for."

The bill further shows that the state, through its Constitutional Convention, submitted to the popular vote the question of

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adopting a provision prohibiting the manufacture, barter, sale, giving away, or otherwise furnishing intoxicating liquors in the state, and the result was the approval by the electors of a constitutional provision of that kind, which has been in force since November 16th, 1907; that, pursuant to that constitutional provision, the legislature of the state, on March 24th, 1908 (Okla. Laws 1907-08, p. 594), passed a general statute, establishing a state agency and local agencies for the sale of intoxicating liquors for certain purposes, and prohibiting the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors, except as provided in the act; that by the terms of said act (art. 3, § 2), it was provided that "the payment of the special tax required of liquor dealers by the United States by any person within this state, except the local agents of said state by said act, should constitute prima facie evidence of an intention to violate the provisions of said act;" and that the defendants, each and all of them, had due notice in writing from the state, by its constituted authorities, of the provisions of the act of Congress, and of the Constitution and laws of Oklahoma, referred to herein.

It should be here stated that the above Oklahoma statute of March 24th, 1908, prescribed various penalties of fine and imprisonment for violations of its provisions.

The bill finally alleges that the state of Oklahoma gave to each of the defendants due notice that it would hold all shipments made by each of them "whereby either of them undertook to receive at points without the state of Oklahoma intoxicating liquors of any kind, and to transport, carry, or otherwise convey such liquors or compounds to or to the order of any of the persons, companies, corporations, firms, or associations named in said list, as illegal, contrary to good morals, against the public policy, and in direct violation of the positive laws of the state of Oklahoma; that the importation of any prohibited intoxicating liquors to or to the order of any of said persons by either or any of said defendants was and is a public nuisance within the state of Oklahoma, and were not importations in good faith, intended for the use of the importer and consignee, and not for sale within the state; that all shipments or deliveries made by defendants by interstate shipment to any or all of the persons named in said list were intended for and were for the violation of the laws of the state of Oklahoma, and to commit a public nuisance in said state; that the state of Oklahoma thereby was not undertaking to object or restrict the defendants in the importation of intoxicating liquors by interstate shipment to any person in said state outside of what was formerly the Indian territory, the Osage Indian Reservation, and an Indian Reservation, January 1st, 1906, intending it for his own use, and not for sale in said state, but that, under the law of said state, each

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and all of said persons intended to use all the liquor in their possession to sell the same in said state, in violation of its laws, and that any delivery of prohibited intoxicating liquors to any of said persons would have the necessary effect of aiding such consignee to violate the laws of the state of Oklahoma, and would be a public nuisance and injury to the said state."

That in addition thereto, under the terms of said chapter 69 of the Session Laws of 1907-1908, of Oklahoma, as therein provided, the state of Oklahoma, for the benefit of its citizens, undertook to furnish intoxicating liquor to all persons in said state wherever a sale of the same was by the law authorized, for reason of necessary use of the same for preservation, or health, or like purposes, and that, under the laws of the state of Oklahoma, the state of Oklahoma was the sole and only person authorized to sell liquors in said state; that the state is peculiarly interested in the sale of said liquors, and irreparably injured by said importation by defendants to the persons named in said list who had paid the special tax required by the United States of liquor dealers, in that the said importation to the said persons named on said list, being for the purpose of a resale of such importations in said state, operated to the injury to the exclusive right to the sale of intoxicating liquors in said state, claimed and exercised by the state of Oklahoma.

That since the 16th of November, 1907, after the said notices were received by the said defendants, and up to this time, the said defendants have continuously and continually, each and all of them, imported to and to the order of each firm and all of the persons named in said list as having paid a special tax, as required by the United States of liquor dealers. And the said persons named in said list have continued continuously to resell said intoxicating liquors so imported by the defendants; that the said resale has at all times been in violation of the law of the state of Oklahoma, and has been a cause of enormous expense and irreparable injury to the state of Oklahoma and the inhabitants thereof, and each and all of the counties and other municipalities therein, in that the enforcement of the laws against the sale of intoxicating liquors is extremely difficult, expensive, and exhaustive, and that the importation and furnishing to said persons named in said list by said defendants of such intoxicating liquors, with the intent that the same shall be used for resale in the said state, has caused a large imposition of expenses upon said state and a violation of its laws, and a constant source of friction and corruption in its government, and is against the peace and dignity of the government of said state, and totally against the public policy thereof and good morals therein, and is a public nuisance in said state; that the defendants, in violation of law and in injury to the rights of the state and inhabitants thereof, have openly, persistently, and continuously im-

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ported intoxicating liquors, whose manufacture, sale, barter, or furnishing is prohibited by the laws of the state of Oklahoma to each and all of the persons named in said list by furnishing, carrying, and conveying the same to and to the order of each and all of the said persons named in said list, on divers and sundry occasions, continuously; and that defendants threaten to continue in the said violation unless restrained, and in continuing so to do said defendants, and each of them, have committed acts which amount to a surrender and an abandonment of their corporate right to do business in interstate commerce in the carriage of intoxicating liquors, and for the same the plaintiff has no adequate remedy according to the course of the common law, for the reason that said shipments originate outside of the state."

The relief asked is that the defendants be severally enjoined and restrained from further introducing, conveying, and furnishing intoxicating liquors, including ale, wine, and beer in any form, at any place, at any time, and in any manner in the state within the limits of what was formerly the Indian territory, including the Osage Reservation, and other parts of the state that existed as Indian reservations on the 1st day of January, 1900; that the several defendants be further enjoined from carrying, conveying, delivering, and furnishing intoxicating liquors, including ale, wine, and beer, in any form and in any place, at any time or in any manner, in the state, to any or all of the persons named in the above list as being persons who have paid the special tax required by the United States of liquor dealers; and that, in default of obedience to the order of injunction prayed for, the corporate rights of the defendants to do a business in interstate commerce with persons in Oklahoma be forfeited.

Such is the case made by the bill, and we come now to consider the controlling questions presented by it.

It is manifest that the object of this suit by the state is, by means of an injunction issued by this court, to prevent the defendant companies from violating the penal or criminal laws of Oklahoma. It is, therefore, in its essence, a suit to enforce those laws. But of such a suit this court cannot take original cognizance, although the suit is in form of a civil nature. The Constitution, after enumerating, in the first clause of § 2 of article 3, the cases, in law and equity, as well as the controversies, to which the judicial power of the United States shall extend, provides that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction,"—in all the other cases enumerated in the article, the court to have appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as Congress shall make.

The words "in which a state shall be party," literally construed, would embrace original suits of a civil nature brought by

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a state in this court to enforce a judgment rendered for a violation of its penal or criminal laws. But it has been adjudged, upon full consideration, that that result was inadmissible under the Constitution. This will appear from an examination of the opinion and judgment in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 267, 290, 293, 32 L. ed. 239, 243, 244, 8 Sup. Ct. Rep. 1370. That was an original action brought in this court by the state of Wisconsin against the Pelican Insurance Company of Louisiana, to recover the amount of a judgment rendered in Wisconsin court against that company for certain penalties incurred by it for violating the laws of that state relating to the business of fire insurance companies. The question was distinctly presented whether the state could invoke the original jurisdiction of this court, to enforce the collection of such judgment. It was argued in that case that the suit was simply an action of debt, founded upon a contract of record, to wit, a judgment, and was therefore to be regarded only as a civil suit, as distinguished from a criminal prosecution. But that view was overruled. The court said that notwithstanding the comprehensive words of the Constitution, "the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens." After an examination of the authorities it was further said, the court speaking by Mr. Justice Gray: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton, Conf. L. § 833; Westlake, International Law, 1st ed. § 388; Piggott, Foreign Judgm. 209, 210." Further: "From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state, or of a foreign country, does not extend to a suit by a state to recover penalties for a breach of her own municipal law. . . . The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to

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pay a pecuniary fine by way of punishment for the offense. This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state, for the recovery of any sum of money, however small, by a way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution." The principles announced in *Wisconsin v. Pelican Ins. Co.* supra, have been recognized in many subsequent cases. (*Postal Teleg. Cable Co. v. United States.*) *Postal Teleg. Cable Co. v. Alabama*, 155 U. S. 482, 487, 39 L. ed. 231, 232, 15 Sup. Ct. Rep. 192; *California v. Southern P. Co.*, 157 U. S. 229, 259, 39 L. ed. 683, 694, 15 Sup. Ct. Rep. 591; *Missouri v. Illinois*, 180 U. S. 208, 232, 45 L. ed. 497, 509, 21 Sup. Ct. Rep. 331; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 234, 235, 46 L. ed. 499, 512, 515, 22 Sup. Ct. Rep. 308; *Kansas v. Colorado*, 206 U. S. 46, 83, 51 L. ed. 956, 968, 27 Sup. Ct. Rep. 655.

Those principles must, in our opinion, determine the present case adversely to the state. Although the state does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare. The statute, viewed as a whole, is to be deemed a penal statute. The present suit, although in form one of a civil nature is, in its essential character, one to enforce by injunction regulations prescribed by a state for violations of one of its penal statutes, and is therefore one of which this court cannot take original cognizance at the instance of the state.

But there is another ground which is equally fatal to the claim that this court may give the relief asked by an original suit brought by the state. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction." In *Oklahoma v. Atchison, T. & S. F. R. Co.*

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No. 13, Original, just decided [220 U. S. —, ante, 434, 31 Sup. Ct. Rep. 434], it was held that a state could not invoke the original jurisdiction of the court, by suit on its behalf where the primary purposes of the suit was to protect its citizens generally, against the violation of its laws by the corporations or persons sued; that the above words, "those in which a state shall be party," were not to be so interpreted as to embrace suits of that kind. We need not repeat what was said in the other case. Without stopping to consider other questions discussed by learned counsel, we hold, for the reasons stated in the opinion in that case, as well as because this suit is, in its essence and mainly, one to enforce a penal statute of a state, that the bill must be dismissed for want of jurisdiction in this court.

It is so ordered.

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et al.

(Supreme Court of Washington, March 27, 1911.)

[114 Pac. Rep. 446.]

Eminent Domain—Public Service Corporations—Logging Road and Water Courses.*—Rem. & Bal. Code, §§ 7106-7109, Laws 1905, c. 82, § 1, provides for incorporation of companies for the construction and operation of logging roads and water courses, for the transportation of logs and timber, and that they may acquire and transfer all such real or personal property as shall be necessary for carrying on the business. Section 2 provides that such corporations shall have the power to construct and maintain logging roads and artificial water courses for the transportation of logs or other timber. Section 3 provides that, after such logging roads or artificial water course shall have been constructed, such companies shall transport all timber products offered for carriage as their means of transportation are adapted to carry, and charge reasonable toll therefor, which shall be uniform; and section 4 provides that such companies shall be deemed quasi public companies and common carriers, and have the right of eminent domain to condemn property in the same manner as exercised by railroad corporations. Held, that such companies are public service corporations, and such act is not unconstitutional as conferring the power of eminent domain for a purpose not public in its nature.

*For the authorities in this series on the subject of logging railroads, see first foot-note of Long Pole Lumber Co. (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669.

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Eminent Domain—Location of Right of Way—Power of Corporation.†—Except as specially restricted by the Legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views as to what is best or expedient, and this discretion cannot be controlled by the courts; therefore a contention in condemnation proceedings that the necessity of adopting the particular road located was not proven cannot be maintained.

Corporations—Proof of Incorporation—Evidence.—Rem. & Bal. Code, § 3682, providing that a copy of a certificate of incorporation, certified by the auditor of the county in which it is filed, or by the Secretary of State, shall be received as prima facie evidence, does not mean that this is the only competent proof of the existence of a corporation, or of the contents of its articles of incorporation, and a triplicate of the original articles, retained in the possession of the company, was sufficient to show their contents without further proof; and the triplicate, showing that the corporation was organized under the law under which it purported to be acting, with oral evidence that such paper was in fact one of the triplicates retained in the possession of the corporation, and that the others were filed in the office of the Secretary of State and county auditor, together with the certificate of the Secretary of State, to the effect that the articles of incorporation were filed in his office, and a receipt of the Secretary of State showing payment of his fees and of the license fee, was sufficient prima facie proof of the existence of the corporation.

Eminent Domain—Logging Railroad—Public or Private Purpose.‡—That all the stock of a timber transportation company constructing a railroad under Rem. & Bal. Code, §§ 7106-7109, conferring on such companies the power to exercise the right of eminent domain, and imposing on them the duties of carriers, is held by a timber company or its stockholders, and that such company is the owner of the largest part of the timber accessible to the line of the proposed road, which timber it will be enabled to transport to market by the building of the road, does not show that the road is a private enterprise, and that the taking of land for a right of way therefor is a taking for a private use, especially where the evidence shows that considerable other timber, not owned by such timber company, will be rendered accessible to this road, and that people and corpora-

†For the authorities in this series on the question who may, and who may not, exercise the power of eminent domain, see first foot-note of *People v. Erie R. Co.* (N. Y.), 36 R. R. R. 587, 59 Am. & Eng. R. Cas., N. S., 587.

‡See foot-note of *Chicago, etc., R. Co. v. Mason* (S. Dak.), 34 R. R. R. 60, 57 Am. & Eng. R. Cas., N. S., 60.

For the authorities in this series on the question what constitutes a public use for which private property may be condemned, see first foot-note of *Dubuque, etc., R. Co. v. Ft. Dodge, etc., R. Co.*, 36 R. R. R. 292, 59 Am. & Eng. R. Cas., N. S., 292.

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 tions other than the timber company will be in a position to demand
 such transportation service on the road.

Department 1. Condemnation proceedings by the Port Crescent Timber Transportation Company against James Clark. From a judgment for plaintiff, the defendant brings writ of review. Affirmed.

R. C. Wilson, for plaintiff.

Trumbull & Trumbull, for respondents.

PARKER, J. The relator has brought here by writ of review and seeks to have reversed an adjudication of public use and necessity, rendered by the superior court for Clallam county against him and in favor of the Port Crescent Timber Transportation Company, in an eminent domain proceeding commenced by that company to acquire a right of way over land of the relator for a toll logging road. The company claims the right to so acquire a right of way over the relator's land by virtue of the power of eminent domain granted by chapter 82, p. 161, Laws of 1905, being sections 7106-7109, Rem. & Bal. Code.

It is contended by counsel for relator that, in so far as this law authorizes the taking of private property for the use therein specified, it is unconstitutional, in that such defined use is not in fact a public use. The provisions of the law are as follows:

"Section 1. Any two or more persons may incorporate a company, having for its principal object the construction, maintenance and operation of logging roads, chutes, flumes and artificial water courses, or water ways and other ways, for the transportation of logs and other timber products. Such corporation shall have power to acquire, hold, use and transfer all such real and personal property as shall be reasonably necessary for carrying on the business of such corporation.

"Sec. 2. Such corporation shall have power to build, construct, maintain and operate logging roads, whether skid roads, railroads or any other kind, also chutes, flumes and artificial water courses, water ways and other ways, for the transportation of logs or any other timber products, together with all necessary yarding grounds, rollways and landings.

"Sec. 3. After any such logging road, way, chute, flume or artificial water course or other improvements shall have been constructed, such company shall transport all timber products offered to it for carriage as its means of transportation are adapted to carry, and such company shall have the right to charge reasonable tolls for the use thereof, which tolls shall be uniform, having due regard to the portion or length of any such logging road, way, chute, flume, or artificial water course or other improvements used by any person. Such company shall have a

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lien for the amount of its reasonable tolls and charges upon any and all logs or other timber products transported by it over its logging road, way, chute, flume or artificial water course. Notice of such lien shall be filed, and the same shall be enforced, in the same manner as is now or may hereafter be provided for the filing and enforcement of liens on logs by boom companies.

"Sec. 4. Such companies shall be deemed quasi public companies and common carriers, and any such company shall have the right of eminent domain and shall have the right to appropriate and condemn lands and property for its use. Such right of condemnation and of eminent domain shall be exercised in the same manner as is now, or may hereafter be, provided by law for the condemnation of property by ordinary railroad corporations exercising the right of eminent domain: Provided, that the right of eminent domain shall not be exercised by any such corporation with respect to any residence. And provided further, that any property acquired by such corporation under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of such property as herein contemplated shall cease for the period of one year, the property shall revert to the original owner, his heirs or assigns. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water power."

These provisions seem to leave no uncertainty as to the service which may be required by the public of a corporation organized thereunder. The language defining the public such service obligation is, such company "shall transport all timber products offered to it for carriage as its means for transportation is adopted to carry." And it is further provided that "such companies shall be deemed quasi companies and common carriers." The argument of counsel for relator touching the question of public use as defined by this law is based upon the fact that such corporations are only required to carry "timber products." It is insisted that this required service is so limited that the whole public cannot command the service of the corporation. It seems to us that the whole public can command the service of the corporation in the business in which it is engaged and authorized to carry on. Every person desiring to ship timber products over such road may require the corporation to carry such timber products under exactly the same conditions. This is certainly a public service; and we are not able to see that it is any less a public service because the corporation is a common carrier of a particular class of property. Every public service corporation is engaged in a business which is more or less limited in character. The fact that such busi-

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ness is so limited does not change its character so far as the right of the public to command the service of the corporation in its particular business is concerned. An express company is generally a common carrier of a particular class of property. A street or interurban railway company may be a common carrier of passengers only. No one would contend that such companies are not public service corporations because of the limited character of their business. This court has recognized boom companies as public service corporations; and such companies, as organized under the laws of this state, are engaged in a business the character of which is confined within just as narrow limits as is the business of corporations organized under this law. Boom companies being public service corporations, their right of eminent domain under legislative grant has been recognized by this court. *North River Boom Co. v. Smith*, 15 Wash. 138, 140, 45 Pac. 750; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 503, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964; *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 401, 92 Pac. 269, 271. In the case last cited, the court said: "The right to condemn is determined by this right of the public to demand the service, so as to make necessary the appropriation sought." We are of the opinion that the public service required of corporations organized under this law is sufficient to support the legislative grant therein of their right of eminent domain, and the law is not unconstitutional because of the limited character of the service required.

It is contended that there was no proof of the necessity to take the particular land described in the petition. The proof shows that the line of the proposed road was surveyed and located by agents of the company on the line described in the petition. The contention does not seem to be against the quantity of land sought to be taken as a right of way, but that the necessity of adopting the particular route so located is not proven. This objection is not available to the relator. The rule upon this subject is stated in 2 *Lewis on Eminent Domain* (3d Ed.) § 604, as follows: "It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the Legislature, those invested with the power of eminent domain for a public purpose can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts."

It is contended that there was no legal proof of the incorporation of the company or of the contents of its articles of incorporation. There was offered in evidence articles of incorporation purporting upon their face to be one of the triplicates executed by the incorporators on August 18, 1910. Oral evidence

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was admitted to prove that this paper is in fact one of such triplicates; that it is the one retained in possession of the corporation; and that the others were filed, respectively, in the office of the Secretary of State and the county auditor. These articles clearly show that the corporation was organized under this law. There was also offered in evidence the certificate of the Secretary of State issued in usual form, to the effect that articles of incorporation of the "Port Crescent Timber Transportation Company" were on the 20th day of August, 1910, filed in the office of the Secretary of State. There was also offered in evidence a receipt from the Secretary of State showing payment of his fees for filing and recording articles of incorporation of this same company, and also showing payment of its license fees. All of this evidence was objected to as not being legally sufficient to prove the incorporation or the contents of the articles. The contention of counsel is rested upon section 3682, Rem. & Bal. Code, which provides: "A copy of any certificate of incorporation filed in pursuance of this chapter, and certified by the auditor of the county in which it is filed, or his deputy, or by the Secretary of State, shall be received in all the courts and places as prima facie evidence of the facts therein stated." We think, however, that this does not mean that such certified copies shall be the only competent proof of the existence of a corporation or of the contents of its articles or incorporation. We think that the triplicate of the original articles of incorporation, retained in the possession of the company as the law requires, was sufficient, to show their contents without further proof, and that the other evidence offered was sufficient prima facie proof of the evidence of the corporation.

It is contended that, since all of the stock of the Port Crescent Timber Transportation Company is held by a timber company or its stockholders, which company is the owner of the largest part of the timber accessible to the line of the proposed road, which timber that company will be enabled to transport to market by the building of the road, the enterprise is in fact a private enterprise, and that the taking of this land for right of way for the proposed road is really taking it for the private use of the timber company. Conceding these facts to be established by the evidence, we think the evidence also establishes the fact that considerable other timber will be rendered accessible to this road, and that other people and corporations than the timber company will be in position to demand transportation service from the company. It was said by Judge Rudkin, speaking for the court in *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 217, 105 Pac. 637, 638, that: "The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe

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to its capital stock does not deprive the road of its public character. The road when constructed will be a public service corporation and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged."

We are of the opinion that the adjudication of public use and necessity should be affirmed. It is so ordered.

DUNBAR, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

O'NEILL v. SAN PEDRO, L. A. & S. L. R. Co.

(Supreme Court of Utah, Feb. 9, 1911.)

[114 Pac. Rep. 127.]

Limitation of Actions—Injuries to Real Property—"Trespass"—Statute—Construction.—Comp. Laws 1907, § 2877, subd. 2, providing that actions for trespass on real property shall be commenced within three years, refers to the common-law action of trespass, which was the remedy for a wrongful entry on lands, and not to trespass on the case, and hence does not include an action against a railroad company for injuries to the house of one living near the road by the jar of the trains and the emission of smoke and cinders; the limitation applicable to such actions being four years under section 2883, as an action not otherwise provided for—(citing 8 Words and Phrases, p. 7089).

Eminent Domain—Subjects of Compensation—Injuries to Property—Smoke and Vibration.*—Except for the provisions of Const. art. 1, § 22, forbidding damage to private property for public use, no action would lie against a railroad company for mere consequential injury to real property by the jar of passing trains and the smoke and cinders, where the road was carefully and properly built and operated.

Eminent Domain—Injuries to Real Property—Damages—Evidence.—In an action for injuries to plaintiff's house by the jar of defendant's passing trains and by the smoke and cinders, evidence was admissible for plaintiff of the cracking of the walls, the settling of the floors, and of other specific effects, though there was expert evidence as to the diminution in value of the property, especially where the

*See first foot-note of *Twenty-Second Corp. of Church, etc., v. Oregon S. L. R. Co.* (Utah), 33 R. R. R. 384, 56 Am. & Eng. R. Cas., N. S., 384; first head-note of *Wilson v. Pittsburg & L. E. R. Co.* (Pa.), 33 R. R. R. 113, 56 Am. & Eng. R. Cas., N. S., 113; foot-note of *Helmer v. Colorado, etc., R. Co.* (La.), 32 R. R. R. 5, 55 Am. & Eng. R. Cas., N. S., 5.

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experts differed widely in their evidence as to value, as the jury could better weigh the expert testimony in the light of actual results; and this notwithstanding that the cause of action was single, for which all damages must be recovered in one action, to be assessed as of the time when the first injury to the property occurred, however slight.

Appeal and Error—Harmless Error—Admission of Evidence.—In such action, the admission of evidence that branches of a tree on plaintiff's premises had been cut by linemen in constructing a telegraph line on defendant's right of way, without connecting their acts with defendant, though error, was harmless, where no damages were claimed therefor, and, under the charge, none could have been allowed, especially as any damage from such acts would be so slight as not to call for reversal.

Eminent Domain—Injury to Real Property—Damages—Evidence.—Nor was there error in admitting evidence that plaintiff had to pay a higher rate for fire insurance because of the proximity of the engines, since the defendant would only be liable for setting fire to plaintiff's house in case of negligence, and, in the absence of negligence, an insurance company would have no recourse to defendant for a loss which it had paid, so that there might well be an increase of rate to fall on plaintiff.

Appeal and Error—Harmless Error—Admission of Evidence.—Any error in overruling an objection to the question whether plaintiff had to pay a higher rate for fire insurance because of the proximity of the engines, in that the particular hazard was not mentioned from which alone an increase could result, was harmless, where no evidence of the rates of premium was shown, so that no damages could have been awarded on that ground.

Eminent Domain—Injury to Property—Damages.—In an action for damages to plaintiff's property by the jar of passing trains on defendant's road, and from smoke and cinders, the construction and operation of the road being conceded to be careful and proper, damages for negligent operation cannot be recovered, but only those which are the proximate result of careful and proper operation of the road.

Trial—Instructions—Cure of Error.—There was no available error in failing to expressly limit the jury to the proper measure of damages where plaintiff's counsel repeatedly disclaimed during the trial any damages except on specified and proper grounds, and where the court, in effect, also properly limited the jury as to the measure and extent of damages to be allowed.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by William O'Neill against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

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Pennel Cherrington, for appellant.

D. B. Hempstead, for respondent.

FRICK, C. J. Respondent brought this action against appellant to recover for alleged injuries to respondent's dwelling house and premises, which, he alleged, were caused by the operation of appellant's engines and trains. The material allegations in the complaint, in substance, are: That respondent in January, 1904, became, and when this action was commenced continued to be, the owner in fee of certain real property in Salt Lake county; that ever since he became such owner he maintained a dwelling house on said premises in which he lived, and continues to live, with his family; that in the year 1905 appellant constructed a railroad track on premises belonging to it, which are immediately adjoining the premises of respondent as aforesaid, and that appellant ever since said time has maintained and continues to maintain said track, which is only 21 feet distant from respondent's said dwelling house on the premises aforesaid; that ever since the construction of said railroad track, and up to the commencement of this action, appellant has operated engines propelled by steam power to which were attached both freight and passenger trains, and which engines and trains were and are being operated over said track both by day and by night; that the operation of said engines and trains caused the ground upon which said dwelling house stands, together with said house, to tremble and shake, and by reason thereof the walls of said house have become cracked in various places, and said house by reason thereof is in a dangerous condition and will eventually fall; that the shaking of said house and the smoke and cinders incident to the operation of said engines and trains over said track have practically made said dwelling house uninhabitable, and have greatly reduced the value of appellant's said property. He further alleged that the damages sustained by him amounted to the sum of \$1,500, for which he prayed judgment. The appellant interposed a demurrer to the complaint on the ground that the action was barred by reason of subdivision 2, § 2877, Comp. Laws 1907, which, in substance, provides that "an action for waste or trespass of real property" must be commenced within three years after the cause of action has accrued. The demurrer was overruled, and the appellant answered, denying that respondent was the owner of the property, but admitted that it had constructed a railroad track, and that it operated engines and trains over it as alleged, and denied all other allegations contained in the complaint. As an affirmative defense appellant in its answer again interposed the plea that the action was barred upon the grounds stated in the demurrer. At the trial respondent, in substance, proved the allegations of his complaint, and in that regard showed to what extent the operation of the engines and trains had in-

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jured his dwelling house by shaking it, in consequence of which the walls were cracked and had settled, and that the house was otherwise injured. Respondent also produced two expert witnesses who were qualified to testify to the value of the premises both before and after the railroad was constructed and operated. One of those witnesses testified that the construction, maintenance, and operation of the railroad had depreciated the salable value of respondent's premises to the extent of \$1,500, and the other one testified that the premises were depreciated for the reasons aforesaid to the extent of \$1,200. Appellant also produced two experts who testified with respect to the effect the operation of the railroad had upon the premises in question. One said that the construction and operation of the railroad depreciated the value of the property to the extent of \$400, and the other one placed it at \$200. After the evidence had all been submitted by both parties, the jury were permitted to inspect the premises, after which they returned a verdict in favor of respondent for the sum of \$1,200. The appellant moved for a new trial. One of the grounds for a new trial was that the jury had allowed excessive damages. The court required the respondent to reduce the verdict to the sum of \$800 or submit to a new trial. Respondent elected to accept the sum of \$800, and the court entered judgment for that amount, from which judgment this appeal is prosecuted.

We shall consider only the errors argued by appellant's counsel in his printed brief.

The first error assigned by him is that the trial court erred because it held that the action was not barred for the reasons before stated. In this connection appellant's counsel contends that the action is one which comes within the provisions of subdivision 2 of section 2877, *supra*. While it is true that, under our Constitution and statutes, all forms of actions have been abolished, and, for that reason, the common-law names that were applied to the various actions or remedies no longer have any practical force or effect, yet, when a court is called upon to give effect to a particular statute, the old terms, as used by the common-law writers, cannot be entirely ignored. In section 2877, *supra*, the term "trespass" is intended to be understood as that term always has been understood when applied to real property as contradistinguished from the general meaning of that term when applied to wrongs or transactions generally. The term "trespass," as used in section 2877, *supra*, must therefore be applied in a restricted sense, and, when so applied, it means a wrongful entry upon lands or the unlawful entry by one person upon the lands of another. In *Hornsby v. Davis* (Tenn. Ch.) 36 S. W. 164, it is said: "In law every entry upon the soil of another, in the absence of lawful authority, without the owner's license, is a trespass." For authorities sustaining the foregoing

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views, see Words & Phrases, p. 7089, where the cases with respect to the term "trespass" as applied to real property are collated. We are clearly of the opinion that the cause of action declared on in the case at bar is what at common law was termed an action on the case, and not one for a trespass. We are also of the opinion that, were it not for the provisions contained in section 22 of article 1 of the Constitution of this state, an action would not lie for mere consequential injuries to real property by reason of the construction and operation of the railroad, where, as in this case, it is conceded that the railroad was carefully and properly constructed and being operated with due and proper care, and that no part of the property has been taken or physically invaded. We have heretofore had occasion to illustrate and apply the conditions and circumstances under which actions for damages arising out of the construction and operation of a railroad may be maintained. In the case of *Morris v. O. S. L. R. Co.*, 102 Pac. 629, a recovery was permitted upon the theory that the property was damaged within the purview of the constitutional provision referred to. That case in principle cannot be distinguished from the case at bar. In the case of *Twenty-Second Corporation, etc. v. O. S. L. R. Co.*, 103 Pac. 243, 23 L. R. A. (N. S.) 860, a recovery was denied because the alleged damages did not come within the constitutional provision aforesaid. The recovery in the *Morris Case*, supra, was, however, not permitted upon the ground that the injurious acts complained of constituted a trespass on real property. We are clearly of the opinion that actions like the case of *Morris v. O. S. L. R. Co.*, supra, and one like the case at bar, fall within the provisions of section 2883, which provides for a four-year limitation in all cases that are not otherwise specially provided for. If we are right in our conclusion that this action is not one which falls within the provisions of section 2877, supra, then there is no other special provision governing it, and hence it must come under the general provisions contained in section 2883. Such is likewise the conclusion reached by many courts. See *Omaha & R. V. Ry. v. Moschel*, 38 Neb. 281, 56 N. W. 875; *Pratt v. D. N. N. Ry.*, 72 Iowa, 249, 33 N. W. 666; 2 *Lewis, Em. Dom.* (3d Ed.) § 968, where some of the cases are collated. See, also, note to *Wells v. New Haven & N. Co.*, 1 Am. R. R. & C. Rep., commencing at page 719 to 724; 2 *Lewis, Em. Dom.* (3d Ed.) §§ 890-892. This assignment must therefore be overruled.

The next assignment relates to the admission of evidence. During the trial the court permitted the respondent to show, over the objection of appellant, in what particulars the operation of the railroad injured the dwelling house by the cracking of the walls, by the settling of the floors, and other specific effects. Evidence was also admitted over appellant's objection with regard to the burning of the leaves of a tree by the engine, and that some of

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the limbs or branches of the tree had been cut by some linemen who put up a telegraph line along appellant's right of way. The evidence with respect to the effect that the passing of the trains had upon the house was in our judgment clearly proper, notwithstanding the testimony of the expert witnesses who testified respecting the diminution of the value of the property. By having the jury fully informed with regard to the effect the movement of the trains had upon the house, they could better understand and apply the testimony of the experts respecting the depreciation of the value of the property. The mere fact that expert witnesses were so far apart with regard to the depreciation of the value of the property is alone a sufficient justification for permitting the jury to become informed of the actual condition of the property both before and after the railroad was constructed and operated. True, in cases like the one at bar the damages must be recovered once for all in one action, and must be assessed as having occurred at the time when the first injury to the property arose because a complete cause or right of action then arose in favor of respondent. To this right nothing could be added, since it was just as complete a cause or right of action after the first train passed the house and shook it and injured it to some extent as it was after a hundred trains had passed and had shaken it, and injured it more. Since the railroad was, however, constructed as a permanent structure and was intended to be operated as a continuing enterprise, the injury and damages to the house and premises were also continuing, and could more easily be perceived and understood after a hundred trains had passed than they could have been after the first one had done so. No doubt a person of ordinary intelligence and experience after noting the effect that the passing of one train had upon the house could, in a measure at least, foreshadow the effect that the passing of a hundred or a thousand similar trains would have, and in that way such person could approximate the depreciation of the value of the premises for dwelling purposes. If the action, therefore, had been brought immediately after appellant had commenced the operation of its trains, and after the house had been shaken for a few times only, any person of experience with special knowledge upon the subject of buildings could have imagined the effect a continued shaking of the house would have, and thus, as we have said, in a measure at least, could have approximated the damages. This is the theory or method, as we understand counsel, that he insists should have been pursued rather than to permit the witnesses to state the actual condition of the house as this condition was seen several years after the actual cause of action had arisen. We have already stated, and counsel for both parties agree with us, that all damages, whether immediate or prospective, in actions like the one at bar, must be recovered in one action, and must be assessed as of the

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time when the cause of action arose whether the damages were then actually visible or not. This would, however, not require the claimant to bring an action immediately, nor would it prevent him from showing just what effect the proper operation of the trains had upon the premises in question, provided he brought the action within the statutory period to which we have referred. In considering such evidence, however, the court and jury no doubt would have to exercise care to limit it to the actual effect attributable to the proper operation of the trains and to exclude the effects of the elements, natural wear and tear, and the usual deterioration of the building. So far as the evidence was limited to the actual effect of the passing of the trains and engines, the court, in view of the instructions to the jury, committed no error in permitting the evidence complained of.

What has been said also disposes of the exception to the remarks made by the judge when the evidence relative to the condition of the house was admitted.

The admission of the evidence with respect to what the line-men did in cutting the branches of the tree, in view that it was not shown that their acts were connected with the operation of the railroad, was perhaps technically erroneous. There was, however, no claim for damages upon this ground, and, under the instructions of the court, none could have been allowed by the jury. Moreover, the damages, if any, resulting from the acts now complained of, would necessarily be so slight that we would not reverse the case upon this ground and for this reason alone.

Respondent, over the objection of appellant's counsel, was also asked the question whether or not he was "charged a higher rate of insurance by reason of the proximity of those engines," which he answered, "Yes, sir." This is also urged as error. No doubt, if through the negligence of appellant its engines would have caused respondent's dwelling to be set on fire and destroyed, he could have recovered the value thereof from appellant in a proper action, and, in case it was insured, the insurance company could have paid the loss and recovered the amount it was required to pay upon the policy from the railroad company. At first blush, it would seem, therefore, that evidence of this character was irrelevant to any issue in a case like the one at bar. It should not be overlooked, however, that a recovery against the appellant could only be had if respondent could show that the fire was caused through its negligence. Appellant in operating its trains with steam engines which may set fire is nevertheless engaged in a lawful business, and, although its engines had set fire to respondent's dwelling, yet, in the absence of an express statute making it liable for setting fire, it would not have been liable unless the fire was caused by

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some act of commission or omission constituting negligence on its part. Respondent thus could recover only in case the fire was negligently caused. It follows, therefore, that there may be a risk or hazard which is covered by an insurance policy, but which cannot be reached in an action against the railroad company, where negligence is not the basis of the action. If the insurance rate is raised to any extent by reason of the latter risk, it falls upon the owner of the property. True, in this case, the question was not limited to this particular risk or hazard as it should have been, but, in view that nothing was said about what the increase in the rate was, the jury could not have allowed any amount on this ground, and, if they did not, no prejudice resulted to appellant.

The last assignment to be specifically noticed is that the court erred in giving certain instructions to the jury, in which the court did not limit the jury in determining the amount of damages to such damages only as necessarily arose from the proper and careful operation of appellant's engines and trains. Counsel's claim is certainly correct that in cases like the one at bar no recovery can be allowed except for injuries and damages which are the proximate result of the proper and careful operation of the engines and trains. Damages arising from the negligent operation of engines and trains would have to be recovered in an action grounded upon negligence, and in such an action only the damages which had accrued within four years immediately preceding the bringing of the action could be recovered, and successive actions for successive acts of negligence might be sustained. In cases like this one the jury should, therefore, be told that only such damages as were caused by the proper and careful operation of the engines and trains should be considered and allowed by them. Although the court did not in this case in express terms tell the jury not to allow any other damages, yet it is apparent from the whole record and from all of the instructions when considered as a whole that the jury were not misled in that regard. During the trial, both counsel, in the presence and hearing of the jury, agreed that no recovery could be had for any acts of negligence. Counsel for appellant does not dispute this, but insists that, in view of the scope of the evidence permitted by the court, the jury might have allowed damages for various matters and things. A complete answer to this is (1) that respondent's counsel at the trial repeatedly disclaimed any damages except for the diminution of the value of the premises which was caused by the proper operation of the railroad; and (2) because the court in substance and effect instructed the jury that such was the measure and extent of the damages they could allow the respondent. We have carefully read and considered the instructions, and we are convinced that, when they

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are read and considered as a whole, appellant has no cause for complaint.

What we have already said also covers the exceptions to all other instructions.

After a careful examination of the record, we have been unable to discover any prejudicial error. The judgment is therefore affirmed, with costs to respondent.

McCARTY and STRAUP, JJ., concur.

VANDALIA R. CO. v. LA FAYETTE & L. TRACTION CO.

(Supreme Court of Indiana, March 28, 1911.)

[94 N. E. Rep. 483.]

Eminent Domain—Legislative Control.—The right to exercise the power of eminent domain or to delegate it and to determine the extent of, occasions for, and conditions upon, its use, lies very largely, if not entirely, in the legislative discretion.

Constitutional Law—Privileges and Immunities—Eminent Domain—Railroads.—Act March 3, 1903, c. 59, § 1 (Burns' Ann. St. 1908, § 5666), authorizing electric railways to condemn the right to cross steam roads, does not violate Const. art. 1, § 23, as granting special privileges and immunities not shared by steam roads; they having substantially the same rights.

Constitutional Law—Equal Protection of the Law—Eminent Domain—Railroads.—Act March 3, 1903, c. 59, § 1 (Burns' Ann. St. 1908, § 5666), authorizing electric railroads to condemn the right to cross steam railroads, does not infringe Const. U. S. Amend. 14, as denying to steam roads the equal protection of the law; they being given substantially the same rights.

Venue—Change—Right to—Eminent Domain.—Change of venue in controversies over the point of crossing of one steam railroad by another is not authorized.

Eminent Domain—Change of Venue.—The provision in Burns' Ann. St. 1908, § 5666, against a change of venue in a proceeding by an electric railroad to condemn the right to cross a steam road, applies only to the special and summary proceeding to fix the point of crossing.

Railroads—Crossings.—One steam railroad company over whose right of way another has secured the right to cross cannot enjoin the physical crossing pending appeal or final determination of the proceedings.

Appeal from Circuit Court, Cass County; John S. Lairy, Judge.

Proceeding by the La Fayette & Logansport Traction Com-

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pany to condemn the right to cross the right of way of the Vandalia Railroad Company. Judgment for the Traction Company, and the Railroad Company appeals. Affirmed.

Anderson, Parker & Crabill, M. L. Fansler, S. J. Crumacker, and John G. Williams, for appellant.

Lairy & Mahoney and Barrett & Morris, for appellee.

Cox, J. This is a special proceeding brought by appellee, an interurban street railroad company, to acquire by condemnation the right to construct, maintain, and operate its single-track road across the right of way and tracks of the appellant, a steam railroad company, at grade. Appellant appeared and filed objections to the point of crossing named in the appellee's complaint and instrument of appropriation, and this issue, which was submitted to the court by agreement, was decided in favor of appellee, and the court adjudged and decreed to appellee the right to cross appellant's right of way and tracks at grade at the point designated in the complaint and instrument of appropriation, and appointed three resident freeholders as "appraisers and commissioners" to assess the damages accruing from such appropriation and use. The appraisers returned their award, and appellant filed exceptions thereto on six separate grounds, all of which but the sixth were subsequently withdrawn. Appellee's demurrer to the sixth ground of exception was sustained, and final judgment rendered confirming and establishing appellee's right to construct, maintain, and operate its railroad across the tracks and right of way of appellant as prayed for and requiring the amount of the award of damages paid into the clerk's office to be paid to the appellant on demand.

The only error assigned is that the trial court erred in sustaining the appellee's demurrer to the sixth specification of appellant's exceptions to the award of the appraisers. Under this assignment of error, appellant contends that section 1 of the act approved March 3, 1903, c. 59 (Burns' Ann. St. 1908, § 5666), relating to the right of street and interurban street railroads to cross steam railroads, is in violation of section 23 of article 1 of the Constitution of the state, because, it is claimed, said section grants to street and interurban street railroads certain privileges and immunities not granted to steam railroads upon the same terms; and that the section for the same reason denies to steam railroads the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

It is averred by appellant, as a part of its sixth exception to the award, and urged by points in its brief, in substance: (1) That an interurban street railroad desiring to cross a steam railroad at grade is given the right to designate the point of

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crossing in the first instance, and that a steam railroad under the same circumstances is not; (2) that, upon the filing of objections by the steam railroad to the point of crossing so designated by the interurban, the crossing place becomes the final one unless changed by the court within 10 days from the filing of such objections, and that no such restriction in time for the hearing is made in a proceeding where one steam railroad seeks the right to cross another; (3) that, upon objections being made by a steam railroad to the point of crossing of its tracks designated by an interurban railroad desiring to cross the same, the court is prohibited from changing the point of crossing so named if the cost of crossing at another point would be materially increased, and that no such consideration or right is given one steam railroad in crossing another; (4) a change of venue is denied in a proceeding by an interurban railroad to condemn a right of way across a steam railroad's tracks upon any issue relative to the point of crossing, and that the contrary practice obtains where one steam railroad seeks to cross another; (5) that the right to sue out an injunction to restrain an interurban railroad company from the performance of acts in connection with the crossing of a steam railroad pending any appeal or the final determination of the proceedings is specifically denied to the steam railroad company, and that a contrary rule applies where one steam railroad is attempting to condemn a crossing over another steam railroad; (6) that an interurban railroad is given six months from the time it may be finally determined on or after appeal that it had not the right to cross at the point designated, and that the point of crossing should be changed to another point judicially determined, to make such change, and that one steam railroad attempting to cross another by condemnation is not so favored.

In considering the statutes in force which give steam railroads the right to cross other steam railroads (Burns' Statutes 1908, §§ 5195 (6), 5222, 5223, 5227) and the statutes giving interurban railroads the right to cross steam railroads (Burns' Statutes 1908, §§ 5666, 5675 (5), 5676, 5677, 5679), it is apparent that the central and essential thing in each case is the delegation of the identical right to exercise the power of eminent domain in furtherance of an enterprise of a public character, coupled with the same accompanying constitutional duty on the part of the one exercising the right of making compensation for the right or property taken. Whatever differences exist are largely matters of procedure.

The right of eminent domain is a sovereign power and lies dormant in the state until by legislative action it designates the occasions, conditions, modes, and agencies for its exercise. The right to exercise the power, or to delegate it and to determine the extent of its use, the occasions for its use, and the

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conditions under which it may be resorted to by any authorized person or corporation, all lie very largely, if not entirely, in the legislative discretion. *Lewis, Em. Dom. (3d Ed.) § 367; 15 Cyc. 567; Consumers' Gas Trust Co. v. Harless (1891) 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; La Fayette, etc., R. Co. v. Butner (1903) 162 Ind. 460, 70 N. E. 529; Richland School Tp. v. Overmyer (1904) 164 Ind. 382-385, 73 N. E. 811; Waterworks Co. v. Burkhart (1872) 41 Ind. 369; Allen v. Jones (1874) 47 Ind. 438.*

The substantial right is the right to take private property by compulsory proceedings, and the manner of acquiring the property, the procedure, is clearly under legislative control. *Lewis, Em. Dom. (3d Ed.) § 378.*

Many times in the legislative history of the state this power has been delegated to different persons and corporations for different purposes with different conditions and modes of procedure suitable to the particular purpose and needs of the enterprise so empowered.

A careful consideration of the statutes above referred to, and the settled practice in condemnation proceedings applicable to railroad crossings of both the kinds in question in this case, will disclose that the same substantial right is given; that a steam railroad seeking to cross another and an interurban railroad seeking to cross a steam railroad each, in the first instance, tentatively selects for itself the point on the road to be crossed at which its route and plans provide, and at which it desires to cross; that this point is named in each case in the instrument of appropriation filed; that ultimately in each case, if contested, the point of crossing is submitted to and determined by the same tribunal on what the Legislature had a right to determine were fair and equitable terms under the conditions.

It is not, as counsel for appellant contends, either the practice or in accordance with the law to grant a change of venue from the county in controversies over the point of crossing of one steam railroad by another. There is no provision which either specifically or inferentially gives the right in such case; and the express withholding of the right to a change of venue in section 5666, *supra*, is not the withholding of a right in the one case that is given in the other. In both cases the proceeding is special and summary up to the review, on exceptions to the award; and from then on they become governed alike by the civil procedure governing other actions. The provision against a change of venue in section 5666 applies only to the special and summary proceeding to fix the point of crossing.

The case of *Wabash R. Co. v. Cincinnati, etc., R. Co. (1902) 29 Ind. App. 546, 63 N. E. 325*, cited by counsel as sustaining the right to a change of venue on the question of the point of crossing in crossing controversies, does not do so. The opin-

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ion in that case discloses that an application for such a change of venue was made and refused, but that after the point of crossing had been fixed by the court, and an award of compensation made by commissioners to which exceptions were filed, another application for a change of venue was made and granted. There is nothing in section 5666 which deprives a steam railroad of the right to a change of venue after the award and exceptions taken thereto. See, also, *Cincinnati, etc., R. Co. v. Wabash R. Co.* (1903) 162 Ind. 303, 70 N. E. 256; *La Fayette R. Co. v. Butner* (1903) 162 Ind. 460-462, 70 N. E. 529; *Terre Haute R. Co. v. Indianapolis, etc., Co.* (1906) 167 Ind. 193-196, 78 N. E. 661.

Nor is it true that a steam railroad company over whose track and right of way another steam railroad company by regular proceedings has secured the right to cross in the lower court has the right, either specifically granted or implied, to stop the physical crossing by injunction pending appeal or the final determination of the proceedings. *Cincinnati, etc., R. Co. v. Wabash R. Co.*, 162 Ind. 307, 308, 70 N. E. 256.

Whatever differences exist in the conditions with which the principal right granted to each class of railroads was accompanied are minor and do not make the right granted to one or the other class materially greater or less than that granted to the other and were based on existing and inherent differences relating to the subject-matter of the legislation which the Legislature had full warrant to consider. Counsel for appellant point to the facts alleged in their exception that "both steam railroads and interurban street railroads are constructed in practically the same manner with grades and embankments, with cross-ties laid thereon and steel rails, with sidings and turnouts constructed in the same manner, and both engaged in * * * carrying in cars passengers and freight for hire, * * * with no practical difference except motive power," as showing conclusively that the Legislature, in enacting the provisions complained of as being advantageous to interurban railroads, did so arbitrarily and capriciously intending thereby to give such railroads an unfair advantage over steam railroads. Such an intent is not manifest and cannot be presumed to aid appellant's assault upon the statute in question. But other physical differences than these noted by appellant and considerations of public interest mark a line between steam railroads and interurban railroads, and the Legislature, at the time of considering the enactment of the sections granting the right of the latter class of roads to cross the former, must be presumed to have intended to adjust their relations in that respect with a view to promoting the public welfare, consideration of which is the primary authority in any case for delegating the sovereign power of eminent domain.

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That there is such an inherent difference between steam railroads, on the one hand, and those named in section 5666, *supra*, and designated therein as "street railroads, interurban street railroads or suburban street railroads," on the other, as justifies placing them in different classes for certain legislative purposes, is conceded by appellant to be settled. *Chicago, etc., R. Co. v. Railroad Commission* (1909) 173 Ind. 469-476, 87 N. E. 1030, 90 N. E. 1011, and cases there cited and reviewed.

And if it be conceded that there is a material difference in the respects asserted, in the acts of the General Assembly granting the right to steam railroads to cross other steam railroads and the right granted by section 5666, *supra*, to street railroads and interurban street railroads, it cannot be said that the difference is not based on reason inhering in a manifest difference in the two classes of roads in the matter of track crossing. It may be conceded that the General Assembly in enacting section 5666, together with the grant of the principal right of a street or interurban railroad to cross a steam road, also enacted certain details relating to the right and the procedure to obtain it which may be beneficial to a street or interurban railroad and which are not found in enactments giving to steam roads a right to cross other steam roads; but it does not follow that the constitutional provisions named were thereby violated. Interurban railroads at the time of the enactment of this section were much newer enterprises than steam railroads. They were to a degree called into being by the development and growth of the state. They were frequently limited and local in their scope. By reason of the fact that their trains consisted principally of single cars equipped with a motive power and appliances enabling them to be quickly started and stopped, they met peculiarly, as the steam roads with their long trains did not and could not well do, those intimate daily needs of our urban, suburban, and farm life for a frequent service of a quick and economical means of intercourse, stopping not only at central stations in cities, towns, and villages, but at convenient stations at street and highway crossings and elsewhere, to receive and discharge passengers and light freight, all to the welfare of the state and the convenience and benefit of her citizens; and, withal, in a measure they were competitors of the steam roads. These and other considerations may well have been in the minds of the lawmakers, and it may have been their intent, acting for the public good, to facilitate the construction of interurban roads and to restrain the power of the senior and more powerful steam roads to hinder and obstruct by the delays of procedure and in this very matter of track crossing. It is also obviously true that by reason of inherent differences the burden added to the easement of a steam railroad by the crossing of an interurban street railroad is not so great either by physical

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injury to the track and roadbed of the steam road, or from danger and consequence of collisions, as that added by the crossing by another steam road. This comes from the fewer and lighter cars, the different motive power, the light single car movement of the interurban, and the quicker and more responsive control as compared to the long and heavy trains of a steam road.

It follows that the section in question is not open to the constitutional objections urged against it.

Judgment affirmed.

WIGGINS v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, April 12, 1911.)

[70 S. E. Rep. 932.]

Master and Servant—Obligation of Master—Duty to Instruct.*—One entering into a contract of employment thereby represents, in the absence of anything to the contrary, that he knows his duties and how to perform them, and the master is not negligent for failing to instruct him.

Master and Servant—Injury to Servant—Failure of Master to Instruct—Negligence.*—A local freight brakeman was injured while attempting to board a coal car while the train was in motion. The accident happened on the first day of his services. He had told the agent employing him that he had done railroading. He testified that he had several times boarded the train while in motion before the injury, and there was no evidence that he had any difficulty in so doing. It was obviously safer to attempt to board the caboose, instead of the coal car, and the conductor had told him to catch the caboose. Held, as a matter of law, that there was no actionable negligence for failure to instruct the brakeman as to the manner of boarding a moving train.

Appeal from Superior Court, Durham County; Lyon, Judge.

Action by John Wiggins, by next friend, against the Seaboard Air Line Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff gives the following account of his injury: "I was 21 on June 6, 1910. I worked for the defendant on February 16, 1910. Had been living at a colored boarding house nine months. Have been in Durham three years. About 6:30 that morning Sol Williamson came after me. I went with

*See extensive note appended to St. Louis, etc., Ry. Co. v. Wells (Ark.), 35 R. R. R. 638, 58 Am. & Eng. R. Cas., N. S., 638.

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him to the cab of defendant's train. It was standing near the colored hosiery mill. When I got there, I went to the cab and got some matches and made a fire, as directed by Sol. Mr. Jordan was conductor; Mr. Sumpter, engineer. It was a local freight, and ran to Henderson and back the same day. It left at 6:30 in the morning, and was due to get back at 3:30 in the afternoon. I was to get 90 cents a trip. We left Durham with seven or eight freight cars. I was told to help unload and shift cars and to ride in the caboose. The caboose was the last car. Sol and myself were brakemen; Sol in the front, and I in the rear. We left Durham at 7:05 that morning. When we got to a station, I would help unload and shift cars. When we would leave a station, I would catch the train as it would start off, and I would wait for the caboose to come on and catch the caboose. I would catch the train as it was moving. There are eight or ten stations between Durham and Henderson. The conductor saw me when I would get on the car while it was moving. At Hesters he told me to drag back some flour, and the train was going on at the time. He told me to go in the depot and drag some flour back, and I had to catch the train while it was running, after I had dragged back the flour. Defendant had handholds and footsteps to catch on. A footstep is about 1½ inches wide at the bottom and the handholds are round pieces of iron about the size of my thumb. The handhold is on the side of some cars and on the end of others. The footstep is on the bottom of the car, and runs about a foot below the bottom of the car. At every station I would get out and help load and unload and shift cars. Part of the time the conductor rode in the caboose, and part of the time he went across to the engine. At Henderson we were shifting cars on the yard, and the conductor told me to catch the cars and go to the top of them and tighten the brakes, and keep them from hitting so hard. I caught the cars while they were running. Coming on back, I helped unload and to shift the cars. I was rear brakeman coming back and Sol front brakeman. Sol and I were colored. The conductor, engineer, and fireman were white. We got to Redwood, returning about 4 o'clock. I got down off the train. Sol cut loose the train, changed switches, and hollered for me to go up and tighten the brakes. These brakes did not go good, and the train had gone back on the main line, and it coupled up, and the engineer Sumpter hollered to me and told me to chock it, and the car did not stop rolling. I chocked it on the upper end, instead of the lower end. Sumpter jumped down from his engine and chocked the car, and came on by me and went on to his engine and started it off. I would have caught it then, but he said something to me; I don't remember what he said. I went to the rear of the train. I got to the rear, but it was leaving so

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fast that before the rear got to me I thought I could not catch it, and I caught the third car from the rear, which was a coal car. There were 10 or 12 cars on this train. The coal car had handholds and footsteps on it. They had one side track on the east side. By 'chocking' a car, I mean taking a stick or something and putting it under the switches, to keep it from rolling. I put the chock on the upper side. At the time the engineer got on his engine, the caboose car was standing on the end of Neuse River Bridge. There were four or five cars between me and the caboose. The train was running about six or eight miles an hour when I caught the coal car. I caught at the coal car, and it threw me under the track, and both cars came after, and the train ran over me and dragged me at least five yards, to the end of the switch, and threw me out just at the switch point."

Sol Williamson, a witness for defendant, testified as follows as to the employment of the plaintiff, who is spoken of as John: "On February 16, 1910, I was employed by defendant as brakeman on the local freight from Durham to Henderson. Mr. Jordan sent me to get Ernest Lyon. I was going after Ernest, when I saw John. I asked him had he seen Ernest, and he said he was gone to the factory, and asked what I wanted with Ernest. I said I wanted him to go out with me. John said, 'Why didn't I give him the extra work?' I said, 'I did not know you wanted to lose a job for one day's work,' and he said that it would be all right; that he would take the extra, and I said, 'Come on, and see what the men said about it.' John goes on back up to the club with me, and when Mr. Jordan came he asked me was that the man I got, and I said that was the only man I got; and John said he had been railroading, and Mr. Jordan asked if he had worked on the railroad. John said he had; that he worked some with the Coast Line and some with the Seaboard. Mr. Jordan said: 'If you have worked for the Coast Line, I am satisfied you can work on this railroad.' He asked John how old he was, and John said between 21 and 22. Jordan said, 'We have got to have some one,' and we went off."

Foushee & Foushee and Manning & Everett, for appellant.
J. L. Morehead and F. L. Fuller, for appellee.

ALLEN, J. There is no evidence in this case that the train was not properly equipped, and the plaintiff does not suggest that any appliance used by the defendant was defective. He vests his case upon the principle that he was an inexperienced hand, and that he was not instructed as to the manner of getting on a moving train. In order to excuse himself from the charge of contributory negligence, he says in his brief: "We submit it cannot be said as a matter of law, upon the evidence

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in this case, that a train moving at the rate of from four to six miles an hour, and when other train hands had caught it at the same time that plaintiff attempted to catch it, was moving so rapidly that a person of ordinary prudence would not make the attempt." If the train was "moving at the rate of from four to six miles an hour," and not so rapidly "that a person of ordinary prudence would not make the attempt" to get on the train, and the plaintiff is therefore excused from the charge of contributory negligence, it would seem that the same facts would exonerate the defendant from the charge of negligence in moving its train too rapidly from its station.

The evidence does not, in our opinion, disclose that the plaintiff was inexperienced, or that any instructions would have given him information he did not have. [1] It is true he was employed by the defendant the day he was injured, but he does not say he had no experience in the work he engaged to perform, and the fact that he entered into the contract of service, nothing else appearing, was a representation that he knew his duties and how to perform them. [2] It also appears that he told the agent of the defendant, who employed him, that "he had been railroading," and that he had worked some for the Coast Line and the Seaboard. He testifies that he had gotten on the train while in motion several times before he was injured, and there is no evidence he had any difficulty in doing so. We fail to see any instruction that would have given him information he did not have.

He also testifies that the conductor told him to catch the caboose car, and that he was injured by trying to get on a coal car. The caboose had a door in the middle of the side, and had two steps below the door, with wooden treads about as wide as a man's hand, and they came closer to the ground than the steps on a coal car, and it also had a long curved handhold on each side of the door. The coal car had only one step and a straight handhold on the end of the car. It was obviously safer to catch the caboose.

We find no error, and the judgment is affirmed.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* WIGGAM.

(Supreme Court of Arkansas, March 6, 1911.)

[135 S. W. Rep. 889.]

Master and Servant—Injuries to Servant—Relation of Parties—Pleading.—In an action against a railroad company for injuries, plaintiff alleged that H. & Co., by whom he was employed, were engaged in reballasting defendant's track when plaintiff sustained the injury complained of. Defendant did not deny that H. & Co. were working for it, and did not plead that they were independent contractors. Held, that defendant could not insist that plaintiff at the time of his injury was a mere employee of H. & Co., and not of defendant, and that it was only bound to exercise the care required as a licensee.

Carriers—Transportation of Employees—Care Required.*—An employee being transported by a railroad company to his place of work is not a passenger, but the railroad company is bound to exercise ordinary care to refrain from injuring him, and he is bound to exercise the same degree of care to prevent injury to himself.

Master and Servant—Injuries to Servant—Negligence—Contributory Negligence—Question for Jury.—In an action for injuries to a servant by being thrown under the handle bars of a hand car by the sudden starting thereof by other employees, evidence held to require the submission of defendant's negligence and plaintiff's contributory negligence to the jury.

Master and Servant—Injuries to Servant—Riding on Hand Cars—Contributory Negligence.—Where plaintiff attempted to ride on the front end of a hand car at the time of his injury, in a place where other employees usually rode, and a reasonably prudent man might believe that he could ride there with safety, plaintiff was not negligent as a matter of law in taking such position.

Negligence—Contributory Negligence—Burden of Proof.†—Though

*For the authorities in this series on the question whether railroad's employees are passengers while riding on its cars, see first foot-note of *Harris v. Puget Sound Elev. Ry.* (Wash.), 34 R. R. R. 43, 57 Am. & Eng. R. Cas., N. S., 43.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to their employees who are injured while being transported to or from work, see third foot-note of *Heiling v. Southern R. Co.* (N. Car.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501.

For the authorities in this series on the subject of the degree of care a servant must exercise for his own safety, see first foot-note of *Ryland v. Atlantic C. L. R. Co.* (Fla.), 35 R. R. R. 56, 58 Am. & Eng. R. Cas., N. S., 56.

†For the authorities in this series on the subject of the burden of proving contributory negligence, see last foot-note of *Danskin v. Pennsylvania R. Co.* (N. J.), 37 R. R. R. 414, 60 Am. & Eng. R. Cas., N. S., 414; first foot-note of *Farris v. Southern Ry. Co.* (N. Car.), 36 R. R. R. 523, 59 Am. & Eng. R. Cas., N. S., 523.

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the burden of showing contributory negligence is on defendant, the defense may be established by plaintiff's evidence.

Appeal and Error—Instructions—Prejudice.—Defendant was not prejudiced by an instruction that contributory negligence is a matter of defense, the burden of proving which is on the defendant, where from all the evidence it was plain that the court meant that the jury in determining such questions should consider all the evidence of the case.

Appeal and Error—Review—Weight of Evidence.—Where there is evidence to go to the jury on a particular issue, the verdict is conclusive on appeal.

Trial—Instructions—Curing Modification—Curing Error.—Defendant requested an instruction that, if the jury believed from the evidence that plaintiff assisted in starting the hand car on which he was riding when he was injured, and then undertook to get on the front end, and in doing so was struck by the handle bar and injured, "without negligence on the part of the other employees," he could not recover. The court gave the instruction, after modifying it by inserting the words quoted, and then charged, at defendant's request, that, if the plaintiff undertook to get on the car while it was in motion, or just as it started, and a person of ordinary prudence would not have done so, or if plaintiff did not exercise ordinary care for his own safety, then he was guilty of contributory negligence and could not recover. Held that, while the modification of the first request was improper and rendered the instruction meaningless, the error was cured by the subsequent instruction.

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by C. F. Wiggam against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. F. Wiggam brought this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for injuries alleged to have been sustained on account of the negligence of the railway company's employees.

The plaintiff, Wiggam, testified that Hodges, Downey & Co. were getting out gravel for the St. Louis, Iron Mountain & Southern Railway Company from the Ouachita river, and were putting it on the main line of the railroad. The gravel pit was something like six miles from Malvern, Ark., where plaintiff resided. It was about three miles from the main line of the railroad. The railroad came from the main line to the gravel pit, and there is one end of the "Y" there that leads north and one that leads south. Plaintiff was employed by one La Duke, representative of Hodges, Downey & Co., to do carpenter work for them at the gravel pit. Plaintiff and one Holt who were hired at the same time asked La Duke how they would

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get to and from Malvern to their work. He told them that they would go and come on the Iron Mountain train. He also told them that when the train stopped they would go and come on the hand cars with the Iron Mountain employees. Plaintiff came and went to and from the gravel pit with the other Iron Mountain employees after they quit using the train. J. V. Miller was one of the railway company's foremen, and Lon Baker was bridge foreman. J. G. Slibeck was resident engineer and head foreman. They all rode to and from the work on the hand cars. Miller usually rode on the front one. Just as they were starting home from work one afternoon, plaintiff was injured while attempting to get on one of the hand cars. He described the occurrence as follows: "That he (Wiggam) was the only white man on this car and the negroes operating same, seeing that they could not get out to the main line on the north leg of the 'Y,' and being in a big rush to get ahead of the other cars, decided to go to the south leg of the 'Y,' and they jerked the car up with Wiggam on it, and he got off and walked across to the south leg of the 'Y,' and as soon as they set it down on the track he walked up by the side of the car to sit down on the front end and threw one leg over the rail, and as he started to bring the other leg over some one gave the car a shove and knocked his feet out from under him, and caused him to fall back under the handle bars, and get struck on his neck and crushed down." Plaintiff said that he had nothing to do with the race to get ahead of the other cars. Lon Baker testified that Slibeck, the engineer in charge of the construction of the spur track to the gravel pit told him to let the employees of Hodges, Downey & Co. ride to and from their work at the gravel pit on the hand cars he was using. Miller testified that he did not remember Slibeck saying anything to him about Hodges, Downey & Co.'s employees going to and from the gravel pit with his crews and on his cars; but that they did so. The plaintiff also adduced evidence tending to show the character and extent of his injuries. J. G. Slibeck for the defendant testified that he did not authorize or instruct Miller, or any other of the foremen, to let Hodges, Downey & Co.'s employees ride to and from their work on the hand cars. Defendant also adduced evidence tending to show that plaintiff was guilty of contributory negligence. The jury returned a verdict for plaintiff, and from the judgment rendered, the defendant has duly prosecuted an appeal to this court. Other evidence will be referred to in the opinion.

W. E. Hemingway, E. B. Kinsworthy, Bridges, Wooldridge & Gantt, and Jas. H. Stevenson, for appellant.
Jabez M. Smith, for appellee.

HART, J. (after stating the facts as above). [1] It is ear-

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nestly insisted by counsel for the defendant that the verdict is not sustained by the evidence. They contend that under the most favorable deductions to be drawn from the evidence that the plaintiff rode back and forth from his work as a mere licensee, without payment of fare and without any contractual relations of any kind with the defendant. On the other hand, counsel for plaintiff insists with equal force that the complaint alleged, and that there is sufficient evidence from which the jury might have inferred, that Hodges, Downey & Co. were working for the defendant railway company, and that, if it wished to avail itself of the defense that Hodges, Downey & Co. were independent contractors, it should have pleaded it as a defense. In support of his contention, he cites the case of Kansas City, Pittsburg & G. R. R. Co. v. Pace, 69 Ark. 256, 63 S. W. 62.

We are of the opinion that the contention of counsel for the plaintiff is correct. The plaintiff alleged in his complaint that Hodges, Downey & Co. were engaged in the work of rebalasting the St. Louis, Iron Mountain & Southern Railway with gravel, and testified that Hodges, Downey & Co. were getting out gravel from the Ouachita river for the Iron Mountain Railroad, and that he was working for them when he sustained the injury complained of. Lon Baker, defendant's bridge foreman, testified that Hodges, Downey & Co. were putting gravel on the main line of the Iron Mountain Railroad for it. The defendant in its answer did not deny that Hodges, Downey & Co. were working for it, and did not set up as a defense that they were independent contractors.

In the case of Kansas City, Pittsburg & G. R. R. Co. v. Pace, supra, the court held that, "if a defendant fails to plead any defense it may have, the same will be treated as abandoned or waived." See, also, Mo. & North Ark. R. Co. v. Pullen, 90 Ark. 182, 118 S. W. 702. In 31 Cyc. 128, it is said: "All defenses not made in the pleadings are considered waived; especially such as are connected with the facts alleged."

Hence we hold that it is too late now to set up that Hodges, Downey & Co. are independent contractors, but that under the pleadings and proof Hodges, Downey & Co. were working for the defendant, railway company, and that their employees were the servants of the railway company. This being true, the law of the case is as follows: [2] "Although an employee being transported to his place of work is not a passenger within the common meaning of the term, the railway company owes him the duty to exercise ordinary care for his transportation, and he is bound to exercise such care for his own safety as a person of ordinary prudence would exercise under the circumstances." St. Louis, Iron Mountain & Southern Ry. Co. v. Harmon, 85 Ark. 503, 109 S. W. 295.

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[3] Under the facts and circumstances of this case as presented by the record, the negligence of the defendant and the contributory negligence of the plaintiff were jury questions. From the version of the occurrence given by the plaintiff, the abrupt and sudden starting of the hand car, without warning to him, just as he was attempting to get on the front end of it, was the cause of his receiving the injury. If true, it was such a consequence as would likely result from the acts complained of. *Doss v. M., K. & T. R. Co.*, 135 Mo. App. 643, 116 S. W. 458.

[4] Nor can it be said as a matter of law that plaintiff was guilty of contributory negligence in attempting to ride upon the front end of the hand car. It was a place where the employees of the defendant usually rode, and a reasonably prudent man might believe that he could ride there with perfect safety. *El Dorado & B. R. Co. v. Whatley*, 88 Ark. 20, 114 S. W. 234, 129 Am. St. Rep. 93; *Doss v. Railway Co.*, supra.

[5] 2. Counsel for defendant next complain that the court erred in telling the jury that contributory negligence is a matter of defense, and that the burden of showing it is upon the defendant. They contend that, while the burden of proving contributory negligence is upon the defendant, it is sufficient if it is shown by the evidence on the part of the plaintiff. [6] Their construction of the law is correct, yet it does not follow that the instruction was prejudicial. The point was ruled against their contention in the case of *St. Louis, I. M. & S. Ry. Co. v. Sparks*, 81 Ark. 187, 99 S. W. 73; Mr. Justice Riddick, speaking for the court said: "But it is evident, when the whole charge is considered, that the court did not intend by this instruction to convey the idea that the defendant must introduce evidence to show contributory negligence, even though it was shown by the evidence of the plaintiff." So in this case, the defendant pleaded contributory negligence as a defense, and introduced evidence to establish it. When the instructions are read together, it is evident that the court meant that the jury in determining the question of contributory negligence should consider all the evidence in the case, that of the plaintiff, as well as that introduced by the defendant.

3. Counsel for defendant also insist that the court erred in instructing the jury on the question of damages for permanent injury. They contend that there is no evidence that the injury is permanent. We think the jury might have inferred from the plaintiff's own testimony that his injury was permanent. [7] While we think the weight of the testimony was contrary to this view, yet the jury differed with us, and their verdict is binding upon us.

4. Counsel for defendant also assign as error the action of the court in giving the following instruction as modified: "(5)

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and its officers, whilst in a perfunctory way at times cautioning the brakeman as to the danger of going between the cars in coupling them, taking no serious steps to stop the practice, but, on the contrary, encouraging it by letting it be understood that the brakeman who does not couple promptly is likely to lose favor or position, or both, held, that defendant, upon whose superior intelligence and knowledge the brakeman has the right to rely, and not the brakeman, should be liable for consequences to the latter of doing what he is encouraged and expected to do, and that defendant is not released from its liability for negligence in so improperly loading a car that it causes the death of the brakeman who undertakes to couple it by any supposed or alleged contributory negligence on the part of the brakeman in going between such car and the car to which it has to be coupled, for the purpose of aiding the "automatic coupler" in doing its work.

(Additional Syllabus by Editorial Staff.)

On Rehearing.

Death—Damages—Mental and Physical Pain.—Deceased was killed, while attempting to couple certain cars, by his head being crushed between a box car and a telegraph pole; it being doubtful whether he was at all conscious after the impact of the car. Held, that the amount of inherited damages for physical and mental pain of deceased was necessarily small.

Death—Damages—Loss of Support.—Deceased, an unmarried brakeman, was killed by defendant's negligence, and plaintiff, a colored woman, who was his mother, 65 years of age, brought suit for inherited damages for decedent's physical and mental pain and suffering, and also for loss of support and maintenance. Decedent earned \$55 a month when working every day, Sundays included, and when no deduction was made for lost time. There was no proof of his contribution to plaintiff's support, except that he sent her money as he could get it, sometimes \$30, sometimes \$20, and sometimes not so much. Held, that a verdict awarding plaintiff \$6,250 was excessive, and should be reduced to \$1,985.50.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by Delia A. Blackburn against the Louisiana Railway & Navigation Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Wise, Randolph & Rendall and *Laycock & Beale*, for appellant.

Bondurant & Smith and *Daspit & Heath*, for appellee.

Statement of the Case.

MONROE, J. Plaintiff sues for damages for the death of her

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son, Lum Blackburn, lately a brakeman in defendant's employ, who died from injuries received whilst in the discharge of his duties, as plaintiff alleges, through defendant's negligence. Defendant filed an exception, with its answer, to the effect that the petition failed to negative the existence of a widow and children, which exception was taken under advisement, and thereafter, with leave of the court, before action on the exception, the petition was amended by supplying the required allegation, whereupon the exception was overruled. The answer admits the death of petitioner's son as the result of the accident referred to in the petition, but alleges that it was caused by the negligence of the decedent.

The facts as we find them are as follows:

In the afternoon of June 26, 1909, there was to be a coupling made between the foremost of four box cars, which were attached in front to an engine and a standing flat car, loaded partly with sewer pipes and partly with telegraph poles; there being four of the latter, two extending lengthwise on each side of the car, with the sewer pipes lying between them. The end of the foremost box car was some three or four feet distant from the end of the flat car when Lum Blackburn went between them to make the coupling, and gave the signal for the engine to move on, which signal was obeyed, with the result that the box and flat car came together. From the testimony as to what happened at that moment, it would seem that Blackburn effected the coupling, or had so adjusted the drawhead on that flat car as to bring it about, with his body in a stooping position, and that in raising himself in the act of withdrawing from between the cars his head was crushed between the end of one of the telegraph poles (which was projecting, or by reason of the impact of the box car was at the moment projected, beyond the end of the flat car on which it was loaded) and the end of the box car. When first released, he moved himself about somewhat, clutched at the place where his mouth (which had been crushed off) had been, and uttered some inarticulate cries or sounds. Whether he was at all conscious after the impact of the car would be hard to say. Two physicians who have testified differ upon that point. He died within 10 or 15 minutes. Whether it was necessary or excusable for him to go between the cars in order to make the coupling is the main issue, upon which the testimony is conflicting. Three brakemen testify that it was necessary and customary. Six witnesses, an engineer, a flagman, three conductors, and a train despatcher, called on behalf of defendant testify to some extent to the contrary. The facts established by the testimony, taken as a whole, we find to be as follows: The cars are equipped in these days, as required by the act of Congress, with what are intended to be automatic couplers, to be operated by a lever from the side of the

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car; but from hard usage, especially on freight cars, exposure to the weather, clogging with dirt and cinders, and the fact that the drawheads have a lateral play of $1\frac{1}{2}$ to, say, $3\frac{1}{2}$ inches it is a matter of uncertainty, when two freight cars come together, whether they will couple or not, so that, in order to be sure that the coupling will be made upon the first attempt, it is always necessary for the brakeman to go between the cars and either open the knuckle of the coupler, or adjust the coupler or drawhead of the standing car, so that it will meet that of the approaching car squarely, or do both, and we are satisfied that it is the common practice for the brakeman to do so, to the knowledge and with the tacit approval of those in authority over them.

Crystal, a brakeman of seven years experience (part of the time in defendant's employ) says:

"To be sure you are going to make a coupling, it is necessary that you should go between them. * * * There is a lever he could open the knuckle with, but he would have to go in there to open it more; some of them fly open and some of them don't; you have to pull that lever on some of the drawheads and reach in there and pull your knuckle out. * * * Q. Why can't you set the coupling before they come together? A. You don't know how it wants to be set at the time. Q. Why don't you know? A. You can not set a knuckle before the time, so it would be sure to make; you just can't set them. I have set them, and have made them, without going in there; but I don't do it all the time, and I didn't know it was going to make. * * * I don't care how much time you got; you can't set them, before the time, so they will be sure to make. * * * I brake every day of my life; that is the only way I make a piece of bread—braking."

Being asked whether it was usual for a good railroad man to go between the cars in order to make a coupling, he answered:

"Yes, sir; to be sure you are going to make a coupling. * * *

"Q. The same man * * * testified that it was the rules of the Frisco people to warn every brakeman they employed not to go between the cars while trying to couple, and that the Frisco and L. R. & N. were operated under the same rules. Were you ever warned by the officials of the L. R. & N. Company not to go between the cars while trying to make a coupling when you were working for them? "A. No, sir."

Bob Davis, a brakeman for 18 years, was in the same crew as the decedent at the time of the accident. Being asked:

"Now, as a brakeman, is it necessary for a brakeman to go between cars in order to be sure that he is going to make the coupling?"

He answered:

"To be sure you have to be; yes, sir. * * * The drawheads which meet to make the coupling some of them have two,

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three, or four inches play, and there are some that are not that far apart; you may have to shove the knuckle from you, or reach over and pull it to you, to make it, and you must go in there, unless your arms are good length. * * * Q. Have you ever made a coupling without going between the cars? A. Yes, sir; but it is only luck that you ever do it. * * * You have to wait until these drawheads come close together and use your judgment, in order to tell whether to shove or pull them; you have to use your best judgment. Sometimes it is necessary to pull or shove them, and when they get about 15 inches apart it is necessary to shove or pull them to you."

John Blackburn has been a brakeman for 19 years. He says you are never positive that a coupling will be made with an automatic coupler, unless you go between the cars. Being asked to explain, he replied:

"Well, on raising the lever on this car you are supposed to open this knuckle. A good many times when you pull this lever the lug will come up, but the knuckle will not fall open. When that lug is up, if it is raised when you pull that lever, the knuckle will stand, and not fall open; then you will have to go in between the cars and pull it with your hands, and then it comes open. * * * A good many times cars are standing in low places; one leans one way and one the other, with both knuckles open; then you will go ahead; then both drawheads will pass each other with both knuckles open, unless you stay there and shove or pull the drawhead, to make it match. * * * They will have to be exactly straight towards one another, with one or both open."

He says he was never warned not to go between cars in order to couple them.

The testimony for the defense upon the question is in substance as follows: Montz, who has been railroading for 23 years and is a locomotive engineer, was in charge of the locomotive which pushed the box cars that were to be coupled by the decedent. He says that it is not necessary for a brakeman to go between cars in order to couple them:

"Because the coupler is automatic and supposed to make itself. They do not always couple on the first impact, and in such cases they generally go there and reset it. * * * Q. Is it possible to tell when they are going to make without being between the cars? A. No, sir, it is not. Q. Suppose one drawhead is a little bad—further to the right or left of the other drawhead—will the cars couple when they come together? A. I cannot answer that. * * * Q. Is it not necessary that one drawhead hit the other drawhead in a particular spot, in order to make the coupling? A. I don't know. Q. Would you consider a brakeman competent who required you, as an engineer, to back your train * * * three or four times, in order to make a coupling? A. No, sir; I would not."

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According to his testimony, the witness was never a brakeman, and never had any, save casual or accidental, experience in coupling cars. McCloskey was flagman in the same crew with deceased, and at the time of the accident had been railroading for about 17 months. He says that he makes couplings every day and also at night. After the accident he made a coupling about two cars ahead of those which Blackburn coupled, or attempted to couple, and he did not go between. Being asked:

"In order to make a coupling, is it necessary that a man should go between the cars at the time they come together?"

"He answered:

"No, sir; not always. Sometimes he steps in, but he does so at his own risk. * * * Q. Why is it necessary sometimes?

A. The knuckle might have slipped a little to one side, or shifted some way; * * * some of them wear, so that they have some play. * * * Q. Is the brakeman absolutely sure that

he will make a coupling by opening the knuckles before the cars come together and getting out before they come together? No, sir."

Lindsay, a freight conductor, has been railroading for 14 years, and served four years as brakeman. He says that with two cars equipped with "Tower" couplers, "in good order," it is not necessary or proper for the brakeman to go between in order to couple them; that standard couplers, "in good condition," will couple automatically eight times out of ten on the first impact.

Freiberger, defendant's train despatcher, says, that in his opinion it is unnecessary to go between the cars equipped with automatic couplers, in order to couple them; that he several times cautioned the decedent about doing so, telling him that it was dangerous and that he would be likely to get hurt; that (quoting his language) "I have cautioned a great many brakemen when I have noticed them following that practice of going between cars to make couplings;" but that he did not make it his business to notice them.

Aldredge, passenger conductor, has been railroading about 15 years, part of the time as freight brakeman. Being asked: "From your knowledge of the subject, is it necessary or proper for a brakeman to stay between the cars when a coupling is made?" he answered, "No, sir." He further said that, if the coupling is not made on the first impact, the brakeman should move the train up, so as to part the cars, and try it again.

Anderson was conductor of the train by which Blackburn was killed. He says that he has had experience since 1889 in coupling cars, but whether as brakeman or conductor does not appear. He had often cautioned decedent to keep from between cars in making couplings. "It is not necessary, with an automatic coupler with which all cars are coupled at this day and date."

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There is testimony to the effect that the flat car upon which the telegraph pole which figures in this case was loaded was between two box cars, but we think the poles were loaded on two flat cars, making what is called a "twin load," the proper method, as it is shown, of loading poles which are longer than one car. The poles were loaded under the direction of Wilson, defendant's trackman, but it is not shown when they were loaded, and Wilson says that he does not know how many miles the cars were hauled between the time of the loading and that of the accident; and, though the load was properly put on, he does not know whether it was properly on at the time of the accident. It is shown by defendant's witnesses that where poles project beyond the end of the car, the loading is improper and unsafe, and it is also shown that immediately after the accident the pole by which Blackburn was killed was found so projecting for a distance of 18 or 20 inches, but it is not shown, as we think, whether that condition existed, or did not exist, immediately before the accident. The decedent was the son of the plaintiff, who was dependent on him; was about 31 years of age, and in good health, when killed, and was earning \$55 a month.

Opinion.

[1] The decedent's right of action survived in favor of his mother only in default of minor children and a widow, or either. As to that, therefore, the exception that the petition did not negative the existence of such children or widow was good, but we are of opinion that plaintiff was properly allowed to amend; the matter being within the discretion of the trial judge.

The cause of action otherwise disclosed, however, is that conferred directly on the plaintiff by the concluding paragraph of Act 120 of 1908, to wit:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife or brothers or sisters, as the case may be."

[2] On the trial the following questions were asked plaintiff and answered by her, without objection, to wit:

"Q. Were you ever married? A. Yes, sir. Q. To whom? A. William Blackburn."

And it was only when she was asked, "Did you have any children by that husband?" that the objection was made "that the marriage certificate is the best evidence of the fact that she had been legally married and had legitimate children," which objection was irrelevant to the question propounded and came too late to subserve the purpose intended.¹

¹ Having proved that she was married, plaintiff was certainly entitled to show by her own testimony that the decedent was her son by that marriage.

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[3] It is undisputed that the immediate cause of Blackburn's death was the crushing of his head between the end of the telegraph pole (loaded on the flat car) and the end of the box car. It is equally undisputed that the loading of a car, with the pole extending beyond the end of it, unless upon another car, thus making a twin load, is improper and dangerous. We, however, think that defendant has fairly made out that as originally loaded the offending end of the pole was within the limits of the car that was coupled (the other end extending over and resting on another flat car), but it remains a question whether it was moved beyond those limits at some time prior to the collision between the flat and the box car, or as the result of that collision. If the pole was projecting before the collision, it might very well be said that the proximate cause of the accident was Blackburn's placing himself between the two colliding objects, the end of the pole and the end of the box car. If the pole was in its proper position up to the moment of the collision, and its projection was the result of the collision, such projection would seem to have been the proximate cause of the accident. for in that case, notwithstanding his going between the cars, Blackburn would not have been killed but for the subsequent movement of the pole. From either point of view, however, we think defendant was at fault with regard to the loading of the car. Its own witnesses say that it is bad and dangerous loading to put a pole on a flat car with the end projecting beyond the limits of the car; and we have no hesitation in saying that it is worse and more dangerous to so place a pole on a flat car that, upon the impact necessary for coupling the car, or any other ordinary and to-be-expected movement, it will be shot forward or backward as a projectile. [4] The question, then, is, Has defendant been released from the consequences of its fault and negligence in furnishing a dangerously loaded car for Blackburn to couple, by any contributory negligence of his, in going between the cars for the purpose of making the coupling? We think not. There were so many persons killed and injured in going between the cars in order to couple them that the government of the United States humanely enacted the law to the effect that cars engaged in interstate traffic should use automatic couplers, and we infer from some of the testimony in this case that, in the more expensive and better cared for equipment of passenger cars, such couplers are used effectively, and have no doubt saved many lives and much misery and distress.

On the other hand, the testimony in this case convinces us, as it appears to have convinced the 12 men constituting the jury and the judge by and before whom the case was tried, that, as applied to freight cars, the automatic coupler is only partially effective, and that the unhappy brakeman is expected to complete its work by going between the cars. From the testimony

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in the record, it appears to us that defendant tries to "save its face," and its officers (no doubt, by its direction), their places, by now and then giving perfunctory cautions about the danger of going between cars to couple them; but we conclude that the brakeman who should insist upon relying upon the automatic coupler, and should require the engine or train to pull off and try it again whenever the coupler failed to couple, would very soon find it necessary to seek some other means of livelihood. It may be said "that would be the proper course for him to pursue," and in many cases and under many circumstances it would be. But, if it be true, as we think it is, that the defendant company (instead of taking such steps as would be effective to put a stop to the practice), whilst indulging in perfunctory warnings, which in this case are attempted to be brought home only to a dead man, tacitly encourages brakemen to couple in the old style, with the prospect of discharge in the air if they do not, it (the company), upon whose superior intelligence and knowledge the brakemen have the right to rely, should be held liable for the consequences to the latter of their doing what they are thus encouraged and expected to do. Mr. Freiburger, defendant's train despatcher, said in his testimony:

"I have cautioned a great many brakemen, when I have noticed them following that practice of going between cars, to make the couplings. Q. Do you make it your business to notice when they go between cars in making couplings? A. No, sir; but when I notice them I caution."

From which it appears that there is such a practice known to him, and that he does not make it his business to notice it; and when he notices it he cautions. He, however, mentions the name of but one brakeman whom he ever so cautioned, and he the man who is dead; whilst the only brakemen who have testified in this case say, without contradiction, that they have never received any such caution, but, on the contrary, that if they failed to make the couplings promptly they were pretty sure to hear from the conductor or the engineer.

Thus Bob Davis (one of the three brakemen who appeared in the case) testified as follows:

"Q. You stated in your direct examination that the reason why the brakemen went between the cars was to adjust the coupling, in order to be sure to make the coupling; is there any other reason why the brakeman is compelled to go between cars? A. Yes, sir; you have to go in there to adjust the coupling, and you have to do so to please the conductor and save time. Q. If you do not go between cars, and you fail to make the coupling, what is the result? A. Well, you do not please the engineer, either the conductor; the engineer will kick, so will the conductor. Q. Has it ever happened to you? A. Yes, sir; plenty of times."

The defendant, no doubt, has many brakemen in its employ,

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and it might have produced some of them to testify in regard to the manner in which the coupling is done on its lines, but it did not. If there is a brakeman working for it who has ever received a notice or a caution upon the subject of going between cars, it might have produced him, but it did not, though its train despatcher and the conductor of the train to which Blackburn was attached very readily remembered that they had warned him repeatedly. And yet in spite of those warnings, which he is not here to tell us about, he lost his life by going between two cars to couple them, as he appeared to think his duty required, though he need not have done so if the defendant, instead of letting it be understood that he would lose favor or be discharged if he did not, had done so simple a thing as to order that he should not do so under penalty of discharge.

Upon the whole we find no error in the verdict and judgment appealed from, whereby plaintiff was awarded the sum of \$6,250, with legal interest from the date of the judgment, and costs, and the same are accordingly affirmed.

On Rehearing.

PROVOSTY, J. [5] A rehearing was granted in this case on the quantum of damages. On the original hearing no stress was laid by either side on the quantum of the damages, and the court, having reached the same conclusion as the jury on the merits of the case, simply affirmed the judgment. On application for rehearing, the attention of the court was called to the fact that of the three elements of damage in cases of this kind—namely, (1) the physical and mental pain and suffering of the deceased; (2) the physical and mental pain and suffering of the plaintiff; and (3) the loss of support and maintenance—only the first and third are alleged or relied on in the petition; and that, as founded solely upon these two elements of damage, the judgment was manifestly too large.

Plaintiff alleges in her petition that the head of the decedent was "crushed to an almost unrecognizable mass," and we found as a fact that "whether he was at all conscious after the impact of the car, it would be hard to say." Under these circumstances the amount of inherited damages for the physical and mental pain and suffering of the decedent cannot be very large.

In the case of *Kimbell v. Homer Compress Co.*, 109 La. 967, 34 South. 41, this court said:

"The boy Kimbell was instantly killed; his skull was crushed between the boiler and the brick wall. [In the instant case between the box car and end of the pole.] He did not live to suffer and then die, leaving an heritable claim to his parents on account of his sufferings."

The court allowed the parents \$1,000.

In *Burns v. Ruddock Cypress Co.*, 114 La. 247, 38 South. 157, where the young man for whose death the suit was brought

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had lived 24 hours after injury and had been subjected to severe pain, the allowance was \$1,200.

In *Clements v. La. Electric Ry. Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, the court said:

"The deceased was almost instantly killed, and no damages can be awarded for sufferings."

We quote this last, not as meaning that where the death is "almost" instantaneous there is necessarily no room for suffering and damage, but merely as expressing the idea and in such cases the margin is scant, and the claim for damages more or less doubtful.

[6] Passing to a consideration of the element of damages for loss of support and maintenance, we find that the plaintiff is a colored woman 65 years old; that her son, the decedent, was earning \$55 per month as a brakeman when working every day, Sundays included, and when no deduction had been made for loss of time; that there is no evidence of his having contributed to the support and maintenance of plaintiff, except the following testimony of plaintiff herself:

"How did he support you? A. He sent me money. Q. How did he send you money? A. As he could get it. Q. How much did he send you every month? A. No certain amount. Sometimes he would send me \$20; sometimes \$30; sometimes not so much."

Considering the well-known improvidence of the colored race, and the irregular life these colored brakemen lead, we think that upon this evidence a regular allowance of \$15 per month would lean more to the side of liberality to the plaintiff than otherwise. The life expectancy of plaintiff according to the American Mortality Tables would be 11 years and 10 days. This, at the rate of \$15 per month, would make \$1,985.50. We have concluded to reduce the judgment to that amount. The physical and mental suffering of the decedent we consider doubtful, and therefore not such as may serve as a basis for judgment. Cases analogous to the present, and showing what allowances have heretofore been made by this court, are the following: *Bland & Wife v. Ry.*, 48 La. Ann. 1061, 20 South. 284, 36 L. R. A. 114; *Foreman v. Eagle Rice Co.*, 117 La. 229, 41 South. 555; *Burns v. Ruddock Cypress Co.*, 114 La. 247, 38 South. 157; *Erslew v. N. O. & N. E. R. Co.*, 49 La. Ann. 87-102, 21 South. 153; *Clements & Wife v. Electric Co.*, 44 La. Ann. 698, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348.

It is therefore ordered, adjudged, and decreed that the judgment heretofore handed down in this case be reduced from \$6,250, with legal interest, to \$1,985.50, with legal interest from the date of the judgment of the lower court, and that as thus reduced the former decree of this court be reinstated and re-affirmed.

SOMMERVILLE, J., takes no part herein.

GILBOURNE *v.* OREGON SHORT LINE R. CO.

(Supreme Court of Utah, Dec. 1, 1910. On Application for Rehearing, March 30, 1911.)

[114 Pac. Rep. 532.]

Evidence—Demonstrative Evidence—Admissibility.—The testimony of an engine foreman of a switching crew that the frame of a broken hand lantern shown him was the same style of lantern as on the rear of a switch engine at the time of an accident is admissible to illustrate the kind of lantern on the engine at the time.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.—Where the uncontradicted evidence showed that a switch engine was equipped with a red lantern, and the only conflict in the evidence was as to whether the lantern was burning at a particular time, the error, if any, in permitting a witness, shown the frame of a broken hand lantern, to testify that it was the same style as the one on the engine at the time, was harmless.

Railroads—Injury to Licensee—Violation of Rules of Employment—Negligence.*—Where a violation of a rule of railroad companies adopting rules for their mutual benefit for the transfer of cars from the yards of either to the other had been tacitly sanctioned, a violation by an employee at a particular time was not negligence per se, so as to prevent recovery from one of the roads for injury to an employee of the other road resulting from a collision.

Master and Servant—Injury to Servant—Violation of Rules of Employment—Negligence.†—A servant disregarding the rules of his master governing his conduct while in the performance of his duties is negligent, and, where the disregard of a rule proximately contributed to an injury, he may not recover therefor.

Railroads—Injury to Servant of Other Company—Violation of Rules of Employment—Negligence.—Where two railway companies adopted rules for the transfer of cars from the yards of either to the other, and a servant of one of the companies violated the rules while engaged in the work of transferring cars, and the violation proximately contributed to a collision of trains in which he received

*For the authorities in this series on the subject of the waiver of rules made for the protection and guidance of railroad employees, see first foot-note of *Feneff v. Boston & M. R. R.* (Mass.), 28 R. R. R. 497, 51 Am. & Eng. R. Cas., N. S., 497; first head-note of *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 28 R. R. R. 244, 51 Am. & Eng. R. Cas., N. S., 244.

†For the authorities in this series on the subject of contributory negligence of servants in violating the rules and orders of master, see foot-note of *Russell v. Louisville, etc., R. Co.* (Ky.), 35 R. R. R. 753, 58 Am. & Eng. R. Cas., N. S., 753; first foot-note of *Craig v. Great Northern Ry. Co.* (Wash.), 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675.

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injury, his negligence could be taken advantage of as a defense by the other company.

Pleading—Issues—Evidence.—Where a railroad company introduced in evidence rules adopted by it and another company for their mutual benefit, though outside of the issues, it could not complain of proof that the latter company had habitually and tacitly sanctioned a violation by its servants of such rules, especially where the court withdrew from the jury evidence of such habitual violations.

Railroads—Injuries to Person on Train—Contributory Negligence.—Whether an engineer injured while in the yards of another company engaged in transferring cars was guilty of contributory negligence in leaving the cab of the engine and in failing to keep a proper lookout for his own safety and to observe the rules designed to prevent collisions between trains held under the evidence for the jury.

Master and Servant—Regulation of Employment—Rules.†—A master may make such reasonable rules as are necessary for the conduct of his business and the safety of his employees, and, where his business is complicated and the safety of the employment depends to a large extent on each servant performing his duties in a specified manner, the master must promulgate reasonable rules which, if observed by the servants, will give them reasonable protection from injury.

Master and Servant—Rules of Employment—Duty of Servant.—A servant must observe all reasonable rules promulgated by the master for his safety, and he may not justify a disobedience thereof by proving that the rules were unnecessary, or that he adopted another method equally safe.

Railroads—Injuries to Licensees—Employees of Other Company—Rules of Employment—Duty of Servant.—Where two railroad companies adopted for their mutual benefit reasonable rules for the transfer of cars from the yards of either to the other, an engineer of one company operating his engine in the yards of the other engaged in the work of transferring cars must comply with the rules, unless they have been habitually disobeyed for such a time as to raise a presumption that they had been abrogated; and, where he is injured in a collision of trains resulting from such disobedience, he cannot recover.

Railroads—Collision of Trains—Contributory Negligence—Instructions.—Where, in an action for injuries to an engineer of a railroad company in a collision while in the yards of defendant company engaged in transferring cars, the evidence showed that the companies had adopted rules for their mutual benefit for the transfer of cars from the yards of either to the other, and that the rules were violated, that the engineer left his cab and took no precautions

†For the authorities in this series on the subject of the duty of a railroad to make and promulgate rules for the protection of its employees, see first foot-note of *Yeates v. Illinois Cent. R. Co.* (Ill.), 35 R. R. R. 65, 58 Am. & Eng. R. Cas., N. S., 65.

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to protect himself from danger, and that he did not heed warnings given him, and the court charged that the employees of the defendant must exercise such degree of caution as to speed and keeping a lookout as was reasonably adequate to prevent a collision, an instruction that the fact that the engineer did not keep a lookout for approaching cars could not avail and could not defeat a recovery, etc., was erroneous.

Railroads—Accidents to Trains—Rules of Employment—Care Required.—Where two railway companies adopted rules for their mutual benefit for the transfer of cars from the yards of either to the other, the employees of the companies must run their cars in the yards with such diligence as to speed and lookout as was reasonably adequate to prevent collisions.

Straup, C. J., dissenting.

On Application for Rehearing.

Appeal and Error—Harmless Error—Erroneous Instructions.—Where the jury found for a party on an issue, he could not complain of errors in the instructions submitting such issue.

Appeal and Error—Instructions—Review.—An instruction not assigned as error by either party is not reviewable on appeal.

Appeal and Error—Cross-Assignment of Error—Necessity.—Where respondent has no cross-appeal, and does not assign cross-errors, the Supreme Court cannot review a decision in favor of appellant. §

Railroads—Collisions—Contributory Negligence.—An engineer of a railroad company who, while engaged in transferring cars in the yards of another company, does all that common prudence and the rules under which he is operating the engine required to protect it against collision, must continue to exercise ordinary care for his own safety.

Railroads—Injuries to Servant of Other Company—Contributory Negligence.—What is ordinary care for an engineer of a railroad company while at work in transferring cars in the yards of another company pursuant to agreements between the two companies is generally for the jury.

Straup, J., dissenting.

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Mike D. Gilbourne against the Oregon Short Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

This is an action for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plain-

§Betz v. People's Bldg., Loan & Savings Ass'n, 23 Utah, 604, 65 Pac. 592; Sanberg v. Victor Gold, etc., Mining Co., 24 Utah, 1, 66 Pac. 360; Snyder v. Pike, 30 Utah, 102, 83 Pac. 692.

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tiff, at the time he received the injuries complained of, was, and for about four or five years prior thereto had been, in the employ of the Rio Grande Western Railway Company, which, for the sake of brevity, we shall hereafter refer to as the "Rio Grande Company." His business was that of fireman and locomotive engineer. For about two weeks immediately prior to the accident complained of, plaintiff had been engaged in switching in the yards of the Rio Grande Company, which are situated about two blocks west and south of the yards of defendant, the Oregon Short Line Company, hereafter referred to as the "Short Line Company." During the two weeks referred to, plaintiff was frequently required to switch and transfer cars from the yards of the Rio Grande Company to the yards of the Short Line Company. The transferring of the cars from the yards of one company to the yards of the other was generally done by a switching or transfer crew, consisting of a foreman known as engine foreman, a locomotive engineer, and two switchmen. The members of the crew were under the direction of the engine foreman, and, in his absence, the locomotive engineer acted as foreman. They all worked substantially together, and accompanied the engine in whatever service it performed. The crew, of which plaintiff was a member, went to work at 1 o'clock p. m. in the afternoon, and quit work about midnight. On the evening of May 6, 1907, this crew, in charge of a Mr. Kelley, the engine foreman, with plaintiff as locomotive engineer, took some freight cars from the yards of the Rio Grande Company over to the yards of the Short Line Company. After setting the cars transferred by them on one of the tracks in the Short Line yards, the crew, with the engine, proceeded south some distance along one of the main tracks in the Short Line yards, and stopped about three-fourths of a block from the yardmaster's office. Kelley, the foreman, left the engine, and walked over to the office to deliver his bills and get a receipt for the cars which he and his crew had just transferred. While waiting for Kelley to return, the engineer, plaintiff herein, and the fireman, got out of the cab and went to the front of the engine, where the two switchmen were leaning up against it, and plaintiff proceeded to climb upon the front part of the engine and to wipe off the glass on the headlight. After doing this, plaintiff returned to the ground in front of the engine, where the fireman and the two switchmen were standing. The engine had been standing at this place from 3 to 15 minutes when a train of cars that was being pushed south on this track by a switch engine operated by a switching crew of the Short Line Company collided with it. The force of the collision propelled the Rio Grande engine forward, knocked plaintiff to the ground, and the wheels of the engine ran over his left leg. Because of the injury, it became necessary for plaintiff to have his leg amputated.

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The rules of the Rio Grande, as well as those of the Short Line Company, in force at the time of the accident, provided that a switch engine should be equipped with a headlight on the front end, and with a headlight or two white lights on the rear. The white lights, when used, are set in brackets, which are fastened on the corners of the tender at the rear of the engine. The brackets on the engine operated by plaintiff on the evening in question were out of repair. One was crushed and the other broken off. Because of the condition of the brackets, the fireman took an ordinary red lantern, and bent the bail or handle, lighted the lantern, and hung it onto a rung of the ladder at the rear of the engine. The fireman and engine foreman of the Rio Grande switching crew testified that this lantern was burning and reflecting light when the engine stopped at the place where the collision occurred. Members of the Short Line crew testified that there were no lights on the rear of the engine just prior to and at the time of the collision. One witness testified that soon after the collision he saw what he took to be the frame of the lantern that was on the rear of the Rio Grande engine lying on the ground just back of where the engine was standing at the time it was struck by the Short Line train. Some of the other witnesses testified that immediately after the collision while searching for the lantern they found pieces of red glass on the ground at a point about where the rear of the engine was when it was struck; that, in their judgment, these pieces of glass were fragments of the globe of a red lantern.

The alleged negligence of the Short Line Company upon which plaintiff relies consisted in the running of its engine and the train of cars mentioned at a high rate of speed, in omitting to have a flagman or any person on the leading or forward car of the train "charged with the duty of keeping a lookout so as to give warning to the engineer in charge of the engine pushing the said cars in case of need," and carelessly and negligently running and operating the said engine and cars without keeping a diligent or any lookout ahead, and in carelessly and negligently failing and omitting to give any warning to plaintiff or other person upon the Rio Grande engine mentioned of the approach of the train of cars that was being pushed by defendant's engine. The defendant denied that it was negligent and alleged contributory negligence on the part of plaintiff.

The case was tried to a jury, who returned a verdict in favor of plaintiff, assessing his damages at \$8,500. From the judgment entered on the verdict, the defendant has brought the case to this court on appeal.

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Parley L. Williams, Frank K. Nebeker, and George H. Smith,
for appellant.

Powers & Marioneaux and J. W. McKinney, for respondent.

MCCARTY, J. (after stating the facts as above). During the examination in chief of witness Kelley, the engine foreman of the Rio Grande switching crew on the night in question, he was shown the frame of a hand lantern that was crushed and broken, and was asked if it was the same style of lantern as the one he claimed was on the rear of the Rio Grande switch engine at the time of the collision, and he answered that it was. Timely objections were made to this evidence by the appellant, on the ground that it was incompetent and immaterial for the reason that the lantern exhibited to the witness was not shown to be the same lantern that was on the rear of the Rio Grande engine at the time of the accident. The record shows that the lantern which plaintiff claimed was on the rear of the engine in question at the time of the accident could not be found. No claim was made that the lantern exhibited to the witness was the same lantern that was broken in the collision, nor was it exhibited and the evidence complained of introduced for the purpose of conveying the impression that it was the same lantern. The only purpose for which the lantern was exhibited, as shown by the record, was to illustrate and show to the jury the kind of lantern which plaintiff claimed was on the rear of his engine at the time of the accident. This, under the circumstances, we think he had a right to do. That illustrations of this kind may be made in the trial of a case is too well settled to admit of serious discussion. 17 Cyc. 293. Moreover, the evidence, without conflict, shows that a red lantern was on the rear of the engine mentioned at the time of the collision. The only conflict in the evidence relating to the lantern was as to whether it was burning and reflecting light at the time of and just prior to the accident. Therefore we fail to see in what way the evidence complained of was prejudicial to appellant, even though it should be conceded, for the sake of argument, that its admission, as an abstract proposition of law, was technical error.

When the evidence was all in and both sides had rested, appellant asked for a peremptory instruction directing a verdict in its favor. The refusal of the court to so instruct the jury is assigned as error. The contention made in support of this assignment is that respondent as a matter of law was guilty of contributory negligence in substituting for and using upon the rear of the engine in question a red light in lieu of the white lights required by the rules of both the Rio Grande and Short Line Companies. The undisputed evidence shows that for several years preceding the collision the switch engines used by the Rio Grande Company in its yards and in the transferring

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of cars from its own yards to the yards of the Short Line Company were usually equipped on the rear end with red lights, the same as the engine in question was equipped on the night of the accident. E. W. Bywater, who, for several years next preceding the collision, was employed by the Short Line Company in its yards as fireman and engineer, was called as a witness, and, in answer to the following questions asked by counsel for appellant, Short Line Company, testified as follows: "Q. You say you had been in these yards for several years? A. Yes, sir. Q. You say you saw Rio Grande switch engines over there at various times? A. Yes, sir. Q. Before this? A. Yes, sir. Q. Had you seen them at nights? A. Yes, sir. Q. Did you observe the lights they carried usually? A. Whenever I could see them. Q. Whenever you saw them, and could observe the lights on the rear end, what were the lights? A. As a rule they carried a red light. Q. Red light or headlight? A. I never saw an engine before the accident with a headlight. Q. Did you see them with white lights? A. No, sir. Q. Never saw them with white lights? A. No, sir." It might well be inferred from this and other evidence in the record of the same import that both the Rio Grande and Short Line Companies at least tacitly sanctioned the violation of the rule requiring switch engines to be equipped on the rear end with a headlight or two white lights. Therefore the infraction of this rule by the respondent on the occasion in question was not negligence per se, as counsel for appellant seem to contend. *Boyle v. Union Pac. R. R. Co.*, 25 Utah, 421, 71 Pac. 988; 1 Labatt, Mast. & Serv. § 366; 26 Cyc. 1269, 1270. And upon this issue the court instructed the jury as follows: "(9) You are instructed that it is negligence on the part of a servant to disregard or fail to observe the rules of his master or employer, designed and intended to govern his conduct while employed in the duties that he is engaged to perform; and, if his disregard or violation of any such rules proximately contribute to any injury complained of, he cannot recover. And in this case you are further instructed that if you find that plaintiff did violate any of the rules of the Rio Grande Western Railway Company, and that such neglect upon his part proximately contributed to the accident, then, under such circumstances, his negligence could be taken advantage of as a defense by the Oregon Short Line in this action, and would be a complete bar to his right to recover, and under such circumstances your verdict should be for the defendant." It will thus be observed that the question of respondent's alleged contributory negligence in failing to equip the engine he was operating on the evening of the accident with the kind of lights required by the rules of the company was fully submitted to the jury.

Appellant further contends that the court erred in permitting

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respondent to introduce evidence tending to show a waiver of the rules referred to on the part of the Rio Grande Company, for the reason that there was no issue presented regarding the abrogation, modification, or waiver of the rules by the company. It appears that the transfer of cars from the yards of one company to the yards of the other was carried on pursuant to certain rules and regulations known as the "Standard Rules and Regulations of the American Railway Association." These rules and regulations, so far as material here, were the same as the rules and regulations under consideration. In its answer, appellant, among other things, alleged, in substance, quoting from the statement of the issues contained in its printed brief, "that by these rules it was the duty of the Rio Grande Company to equip its locomotives used in this transfer service with a headlight on the rear, as well as on the front, or, in lieu of a headlight on the rear, to equip such locomotive with two white lights on the rear thereof; * * * that it was also the duty of said Rio Grande Company to require its employees to keep a lookout in handling these locomotives, and protect themselves against collisions; that it had negligently failed to do these things, but, on the contrary, in violation of the rules governing the operation in question, sent said locomotive into the railroad yards of the defendant not equipped with such lights, and permitted its employees to stop such locomotives and remain upon a certain main line in such yards without displaying any lights on the rear thereof." Nowhere in its answer does the appellant allege that either respondent, the engine foreman, or any other member of the Rio Grande switching crew was guilty of negligence because of any violation of these rules, or because of the violation of the rules of the Rio Grande Company, which, so far as material here, were the same as the "Standard Rules and Regulations of the American Railway Association." But, on the contrary, appellant specifically alleges that the Rio Grande Company "sent the said locomotive into the yards of the defendant not equipped with such lights," etc. The only allegation in the answer charging negligence on the part of respondent is the general allegation "that the injuries received by plaintiff, and the damages resulting therefrom, if any, were caused by an accident which resulted from the wrongful and negligent acts, conduct, and omissions of the plaintiff." Under the issues tendered by these allegations of the answer, appellant was permitted to introduce in evidence the rules heretofore referred to of the Rio Grande and Short Line Companies, and to show, by cross-examination of respondent's witnesses, that the rules and regulations requiring that the switch engines should be equipped with certain kinds of lights were not observed and followed by respondent on the evening of the accident. Appellant, having thus opened up the question which

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it claims was outside of the issues, cannot be heard to complain because the court permitted respondent, on redirect examination of his witnesses, and by the introducing of other evidence, to show that the Rio Grande Company had habitually and for a long period of time tacitly sanctioned the violation of these rules. And, furthermore, the court, by giving the following instruction, withdrew the question from the jury, and they were in effect told not to consider it: "(14) You are instructed that in this action there is no issue made or presented that the rules governing the operation of switch engines or transfer engines in the yards of the Oregon Short Line were modified, changed, or abrogated in any manner or at all; and any evidence that may have been admitted in the case with reference to whether or not the Rio Grande Western switch engines had prior to the accident operated in the Oregon Short Line yards without being equipped with white lights or a headlight on the rear of such engine, and in lieu thereof had used a red light, was not admitted for the purpose of proving or tending to prove any change, modification, or abrogation of the rule requiring switch engines to be equipped with a headlight on the rear of such engines, or, in the absence of such headlight, two white lights, and any such evidence must not be considered by you as proving or tending to prove any change, abrogation, or modification of such rule, because, as heretofore stated, there is no issue of that kind presented in this case."

It is further contended that respondent should as a matter of law be deemed guilty of contributory negligence because he left his position in the cab of the engine and went out upon the front of it, and failed to keep a proper lookout for his own safety, and for his alleged failure and neglect to observe the following rule of the Rio Grande Company which was in force at the time of the collision, namely: "All signals must be used directly in accordance with the rules; trainmen, engineers, and firemen must keep a constant lookout for signals." The evidence shows that at the time the engine was stopped at the point where it was standing when the collision occurred the glass on the headlight was a "little smoky," and the light was burning a "little dim," and respondent left the cab and got onto the front of the engine and wiped off the glass. Respondent testified that after he had cleaned the glass and was in the act of climbing down from the headlight to the ground, or about the time he reached the ground in front of the engine, the collision occurred. John A. Douglass, one of the switchmen, was called as a witness, and his testimony tended to show that the collision occurred either as respondent was climbing down from the headlight or immediately after he reached the ground. The fireman, however, testified that he, the two switchmen, and respondent were sitting on the pilot beam in front

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of the engine, and had been in that position for 10 or 15 minutes, when the accident occurred. J. W. Love, a witness for appellant, testified that he was a member of the switching crew who were operating the Short Line train at the time of the collision; that he was about 125 yards south of the Rio Grande engine when the accident occurred; that just before the collision he gave respondent and the other members of the Rio Grande switching crew signals "to come out of there—move forward with their engine." He said, quoting him literally: "I gave come-ahead signals to them with my lantern. They apparently did not pay any attention to them, because they did not move. So, I gave others. Then I whistled with my mouth to attract attention. That was a shrill, sharp whistle. They would be able to hear it, but they paid no attention apparently, because it (the engine) did not move." He further testified that he went to the scene of the accident immediately after it occurred, saw respondent and the other members of the Rio Grande crew there, and spoke to them about the signals he had given them to move their engine onto another track. He said, again quoting: "I asked them if they saw the signals, and they said yes; and I asked them why they didn't come out of there then, and they said they didn't know who it was, and Mr. Gilbourne had said it might be Kelley, and, if it was, he could come down there if he wanted them." On cross-examination he testified in part as follows: "I certainly had in mind that Gilbourne's engine standing there was in danger, for I always considered a man standing on the main line in danger. I wanted this engine out of the way, but they apparently did not observe or pay any attention. I could not tell how far our train was away when I whistled. I don't think there was any immediate danger at that time." Gilbourne testified that he did not see the signals given by Love; that, if he had seen them, he would have moved ahead with the engine. In view of the circumstances under which respondent left the cab and went to the front of the engine, we are not prepared to say that in doing so he was as a matter of law guilty of contributory negligence. We think this matter, and the question as to whether he kept a proper lookout for signals and for approaching cars during the time the engine was standing on the track where the collision occurred, were questions of fact for the jury to determine.

In regard to the use of a red light on the rear of the engine on the night in question, instead of the kind of light required by the rules of the company, and the alleged failure of respondent to keep a proper lookout for signals and for approaching cars during the time his engine was standing on the track before the collision occurred, the court instructed the jury in part as follows: "(12a) You are instructed that if you believe from the evidence that while the plaintiff's engine was standing in the

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yard it had a red light burning on the tender end of the engine, and that this was the usual and customary manner of warning other trains approaching on the same track, or was all the warning that ordinary care required, and that it was sufficient to prevent other trains or cars being run against the plaintiff's engine, if the persons operated them with ordinary care, then the plaintiff fully met the requirements of ordinary care on his part in this respect, *and the fact that the plaintiff did not in addition keep a lookout for approaching cars cannot avail the defendant nor in such circumstances would the fact, if it be a fact, that plaintiff was sitting on the pilot of his engine, be any obstacle to his right to recover damages in this case.*" Appellant excepted to and assigns as error the giving of this instruction. The court by giving that part of the instruction not italicized, in effect, told the jury that, if they found from the evidence that the installing and using of a red light on the rear of the engine was as efficient a method of protecting it as the kind of lights required by the rules, then, in that event, respondent did not commit a breach of any duty he owed the railroad company by substituting a red light for the kind of lights required by the rules. Now, the rule is elementary that a master has a right to make such reasonable rules and regulations as are necessary for the conduct of his business and the guidance and safety of his employees. In fact, in a complicated business such as railroading, in which a large number of persons are employed, and the safety of the employment, to a large extent, depends upon each employee performing his duties promptly and in a specified manner, it is the duty of the master to promulgate reasonable rules and regulations, which, if observed by the servants, will give them reasonable protection from injury. 1 Labatt, Mast. & Serv. § 210; 26 Cyc. 1157, and cases cited in note. And the law is equally well settled that the servant is under a corresponding duty to faithfully observe and comply with all reasonable rules promulgated and furnished him by the master for his guidance and safety, and he cannot justify himself in his disobedience of a rule by showing that it was unnecessary, or that he adopted and followed some other method which was equally as safe and as efficient as the rule promulgated and furnished him by the master. 26 Cyc. 1161, 1270; Bailey's Mast. Liab. to Serv. pp. 72-85. Respondent concedes this to be the law, and cites, with approval, 1 Labatt, Mast. & Serv. § 367, wherein the author says: "Every breach of a rule represents a breach of a contractual obligation which has been either expressly assumed by the servant, or is implied by the fact of his having accepted or continued in the given employment with due notice of the existence of the rule. The servant's agreement is that whatever may have been, apart from the rule, the standard of proper care, under the circumstances,

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the rule itself is to define that standard as between the servant and his master, as long as the former remains at work. That this is really the prevailing view, even in the two states above mentioned (New York and Texas), is abundantly evident from numerous decisions in which recovery has been denied as a matter of law for the reason that the injury was caused by the violation of a rule." Respondent insists, however, that this rule is binding only as between master and servant, and that it does not obtain in cases where the servant is injured by the act of a stranger. As stated by Mr. Labatt, the principle upon which a servant is debarred from recovering damages from his master where he has been injured because of his failure to observe a rule of his master is that the servant is under a contractual duty to obey his master, and his failure to do so is held to be negligence. And the authorities seem to hold that, where a servant has been injured while violating a rule of his master by the negligent act of a stranger to whom the servant owed no contractual duty and for whose benefit the rule was not made, such stranger cannot successfully resist the servant's claim for damages by pleading the servant's violation of the rule. But this is not that kind of a case. In the case at bar each of the railroad companies mentioned operated its trains, switch engines, and transferred cars from the yards of one company to the yards of the other under and in accordance with the "Standard Rules of the American Railway Association." The rules of this association, so far as material here, were adopted by the two companies for their mutual benefit. And respondent, while operating his engine in the yards of the Short Line Company, owed the same duty to that company to observe the rules common to both companies to avoid injury to its property and employees as he owed to the Rio Grande Company in that respect. It is conceded that these rules, which were incorporated in and made a part of the rules of the Rio Grande Company, provided that switch engines should be equipped with either a headlight or two white lights on the tender end of such engines, and the evidence shows that respondent was familiar with these rules. In fact, he himself so testified. No claim was made, nor was there any evidence introduced to show, that the rules were unreasonable, or that they prescribed a negligent or dangerous method of doing the work. It was therefore the duty of respondent to faithfully observe the rules, unless they had been habitually disobeyed in such manner and for such a length of time as to raise a presumption that the Rio Grande Company had notice of such habitual and continued disobedience, and that respondent was warranted in acting upon the assumption that the company had abrogated the rules. 1 Labatt, Mast. & Serv. § 232. But in this case, as we have observed, the question of whether there had been any change, modification, or an abroga-

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tion of the rule under consideration was withdrawn by the giving of instruction 14. The withdrawal of that question from the jury, whether right or wrong—a question we are not called upon to determine—narrowed this phase of the case to the simple proposition of whether or not the violation of the rule directly contributed to and was a proximate cause of the collision.

It is further contended on behalf of appellant, and we think the contention is well founded, that the court, by giving that part of instruction 12a which we have italicized, withdrew from the jury the defense of contributory negligence so far as it was based upon respondent's act in leaving the cab and going to the front of the engine, and his failure to keep a lookout for approaching cars along the track upon which the engine was standing. By giving the italicized part of this instruction, appellant was deprived of whatever benefit it might otherwise have derived from the evidence tending to show that respondent, after cleaning the headlight of the engine, took and occupied a position on the pilot beam of his engine, and that he failed to obey the signals given by the witness Love just prior to the collision for him to move forward with his engine, and that, after cleaning the glass of the headlight, he, together with other members of the crew, sat down on the pilot beam of the engine where they could not keep a lookout to the rear of the engine for approaching cars from the north, and remained in that position anywhere from 10 to 15 minutes. This evidence, if believed by the jury, might have resulted in a verdict in favor of appellant, provided the issue in support of which it was admitted had not been withdrawn by the giving of the last-mentioned instruction. Furthermore, the court, in defining the degree of care and caution that the switching crew who were operating the Short Line train at the time of the accident were legally bound to exercise to avoid a collision, charged the jury as follows: "(15) You are further instructed that it was the duty of the employees of the defendant company to run and manage the cars in question with such degree of diligence and caution in respect to speed and keeping a lookout ahead as was reasonably adequate to prevent them colliding with other engines or cars standing in the yards. This was the duty of the employees of the defendant company without regard to any rule of the company. If this duty was not observed the company was guilty of negligence. * * *" This instruction, so far as it went, correctly defined the degree of care that the Short Line Company, acting through its agents and servants, was legally bound to exercise in operating its train on the occasion in question. And the switching crew of which respondent was a member were under a corresponding duty to exercise due care for their own safety. The legal duties and obligations

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of the two switching crews in this respect were coextensive; that is, the same degree of care and diligence was demanded of each. Or, to state the proposition negatively, neither crew under the circumstances was bound to exercise a greater degree of care and diligence than could legally be required of the other. The court in defining the degree of care that the crew of the Short Line Company was bound to exercise to avoid a collision on the occasion in question stated the rule correctly. Moreover, respondent was an experienced locomotive engineer. He stopped, and was holding his engine, upon a track along which he knew a train might pass at any moment. He was under all the authorities legally bound to use the same degree of care and caution that a prudent and cautious man skilled in the same kind of work ordinarily use under the same or similar circumstances. The court by giving the italicized part of instruction 12a, not only invaded the province of the jury by in effect charging that certain conduct of respondent, if shown to have transpired, was not negligence, but fixed a much lower standard or degree of care and caution for respondent to exercise when operating his engine in the yards of appellant than that required of him by law, and a lower and different standard of care than that prescribed by instruction 15 for the Short Line Company. The giving of the italicized part of the instruction 12a was clearly prejudicial, as it deprived appellant of a substantial right.

The judgment is reversed, with directions to the trial court to grant a new trial, costs of this appeal to be taxed against respondent.

ARKANSAS MIDLAND R. CO. *et al.* v. PEARSON.

(Supreme Court of Arkansas, March 20, 1911.)

[135 S. W. Rep. 917.]

Charities—Liability of Charitable Societies—Hospitals—Negligence of Physicians.—Hospitals conducted for charity are not responsible for the negligence or malpractice of their physicians.

Hospitals—Liability—Negligence of Physicians.—Hospitals treating patients for hire are generally responsible for the negligence or malpractice of their physicians.

Master and Servant—Master's Liability—Medical Attendance—Negligence of Physicians.*—A monthly hospital fee was deducted from the pay of a railroad employee to maintain a hospital for the employees when occasion required. After an injury to the employee, from which he died, he was treated in such hospital. Defendant derived no profit from such hospital department. Held, that defendant was a mere trustee to administer the hospital fund, and was responsible only for ordinary and reasonable care in the selection of competent and skillful physicians and attendants, and it was not liable for the negligence or malpractice of physicians employed by its hospital department.

Evidence—Opinion Evidence—Examination of Experts—Hypothetical Question—Facts Included—Controverted Facts.—A hypothetical question to an expert need not cover all the facts which have been proved, but the interrogator may select such as he conceives to have been proved, and it is not necessary that the facts stated shall be uncontroverted; it being sufficient that there is evidence tending to prove the facts.

Appeal from Circuit Court, Phillips County; Hance N. Hut-ton, Judge.

Action by W. E. Pearson, administrator of the estate of Jack Campbell, deceased, against the Arkansas Midland Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This suit was brought by appellee to recover damages for the benefit of the widow and next of kin and the estate, for the wrongful death of his intestate, caused, it was alleged, by the failure to furnish him proper medical and surgical attention.

It was alleged that the deceased, Jack Campbell, while in the discharge of his duties as conductor of a freight train on appellant's road known as the "accommodation," running from

*For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see last foot-note of *Barden v. Atlantic C. L. Ry. Co.* (N. C.), 36 R. R. R. 558, 59 Am. & Eng. R. Cas., N. S., 558.

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Helena to Clarendon and return, jumped or fell from the top of one of the box cars on September 22, 1908, at about 11:45 a. m., and sustained from said fall the following injuries: "A comminuted fracture of the right ankle and fracture and dislocation of the left ankle." That both said injuries were serious, and the demand for immediate skillful attention urgent. That the train was ordered to proceed on its regular trip, and the said Campbell was left at the town of Holly Grove, where only the most perfunctory attention was given him until the return trip of the train about 2 o'clock p. m. That he was then placed on a crude cot in one of these box cars, and without any attendant provided by defendant was brought to the city of Helena, arriving at 8:30 p. m. That while said Campbell was in said box car the train did its regular and ordinary work, switching a large number of cars at the towns of Womble, Poplar Grove, and Barton, by reason of which he was roughly and cruelly thrown from side to side upon his cot and caused to suffer untold agony, and his wounds to receive fresh injuries. That the company physician failed to do anything for his relief, and upon his arrival at Helena advised that he be taken to the hospital at St. Louis, which was done, by defendant's direction, on the morning of September 23d. On arriving at St. Louis at 8:30 p. m., by reason of the failure of the defendant's hospital department to provide an ambulance as it had agreed to do, he was compelled to remain in the station for several hours, and did not reach the hospital until 11 o'clock at night. That he then received no attention, except a perfunctory examination by an interne, until 11 o'clock the next day, at which time decomposition had set in, and that he died the following morning, as a result of said injuries, at 7:30 o'clock.

Plaintiff charges that the proximate, the immediate, and the only cause of the death of said Campbell was the gross negligence, indifference, and inhumanity of the defendant company. Plaintiff charged the truth to be that, if the defendant had used even ordinary care and caution in the treatment of said Campbell after the nature and extent of said injuries were fully known to defendant, his life could and would have been saved and his usefulness unimpaired. That by reason of said failure by defendant to provide surgical and medical attention at the proper time, and by reason of the delay in getting said Campbell where he could be and would have been properly treated, which said delay was caused by the gross negligence and carelessness and indifference of the defendant, said Campbell was caused to suffer and did suffer the most excruciating misery and physical pain, by reason of which he was finally caused to lose his life. That he left surviving his widow, Maggie Campbell, and five children of the ages of 12, 10, 7, 5, and 3 years, respectively. At the time of receiving said injuries, he was 39 years

old, in perfect health, and earning \$100 a month. That deceased contributed to the maintenance and support of his wife and children as aforesaid the entire amount of his salary; that he was sober, industrious, of good moral character, in direct line of promotion, kind to his children, and solicitous of their well-being. Prayed judgment for \$15,000 for the widow and children, and for the mental and physical pain and suffering of deceased, for the benefit of his estate, damages in the sum of \$10,000.

Defendant filed a motion to strike out certain parts of the complaint, which was overruled. It then answered, denying that said Campbell was engaged in the performance of his duties as conductor of the train mentioned when he received the injuries complained of; that there had been taken out and retained by the defendant any sum of money from his salary for the support and maintenance of the hospital department of the defendant, and that in return therefor it was understood by and between the said defendant and Campbell that he should receive proper medical and surgical attention, to be supplied and furnished by the said defendant whenever the emergency or necessity therefor should arise; that it was defendant's duty to give such medical and surgical attention to said Campbell, and denies that there was any neglect of such duty. Denied all the material allegations specifically. Alleged that deceased was allowed to remain at Holly Grove after the accident and injury, and put upon the return train and carried to Helena at his own solicitation and suggestion, and made as comfortable as possible on his return trip, and handled with all the care and attention as was suggested and required by him. Denied that any physician or surgeon on its behalf failed to do anything for Campbell's relief. Alleged that everything possible was done for his comfort and relief, and that it was at his request that he was transferred to the hospital at St. Louis. Denied that there was any failure or refusal of hospital department to provide an ambulance to take him from the station to the hospital, or that it had agreed or promised to do so. Denied that after reaching the hospital he received no attention, and alleged that he was properly examined and treated, and everything known to medical science and surgery was done and performed for the said Campbell. Denied that he died as a result of any neglect of defendant as to his alleged injuries. Denied that it failed to use ordinary care and caution in the treatment of Campbell, or that his life could and would have been saved and his usefulness unimpaired by the most skillful treatment known to medical or surgical science. Denied that the nature and extent of his injuries were fully known to the defendant at the time, that there was any failure to provide surgical and medical attention at the proper time, or that by rea-

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son of any delay to get Campbell to a place where he could and would have been treated he was caused to suffer, or that by reason of any such failure said Campbell was caused to lose his life. That plaintiff was entitled to recover any damage for mental or physical suffering.

Answering the second paragraph of the complaint, denied that deceased was conscious of mental or physical pain and suffering, or that it was caused by or was the direct or proximate result of any cruel or inhuman treatment alleged to have been received by him while on the return trip to Helena, or that any part thereof was caused by any negligence or careless failure of the defendant to provide surgical and medical attention at the proper time, or that there was any failure on the part of defendant to provide proper medical and surgical attention to said Campbell, and alleged that he did receive proper medical and surgical attention and treatment, and whatever was done in the way of caring for him after the injury, and in the way of medical and surgical treatment or in transportation to secure the same, or in the waiting for such medical or surgical treatment, was pursuant to the request of the said Campbell himself. Denied that his estate was damaged in any sum whatever by any wrongful or negligent conduct on the part of the defendant. Alleged, further, that, if deceased experienced or endured mental or physical pain or suffering, same was caused and contributed to by his neglect and his own conduct, and pursuant to his own request; that any injuries or damages alleged were within the assumed risks and hazards of said deceased as to his employment, for which the defendant was not liable.

An amendment to the complaint was filed, alleging the sale of the Arkansas Midland Railroad to the St. Louis, Iron Mountain & Southern Railroad Company after the filing of the complaint, and the consolidation and merger of the said roads. Prayed that said St. Louis, Iron Mountain & Southern Railroad Company be made a party defendant, and for judgment against it as against the Midland. The St. Louis, Iron Mountain & Southern Railroad Company appeared, and adopted as its answer to the original and amended complaint the answer filed by the Arkansas Midland Railroad Company, "and each and both of said defendants denied any liability whatever, and prayed judgment on behalf of defendants herein, and for all other and proper relief."

The testimony tended to show that Jack Campbell was conductor on the accommodation train carrying freight and passengers, running from Helena to Clarendon and return, at a salary of \$100 a month, that he fell or jumped from the top of a box car to the ground in the yards at Holly Grove about 11 o'clock on the morning of the 22d of September, 1908. That the brakeman and engineer went to his assistance and set him

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up in the box car, carried him down to the station, and sent for the doctor. Dr. Sylar was the company physician at Holly Grove, and reached the patient within 20 or 30 minutes after he was telephoned for. The witnesses first reaching him saw that his ankle was swollen. The skin was not broken, but badly bruised, turning black. He had removed his shoes before they reached him. The car was stopped near the station by Campbell's direction, and the physician examined him while in the car, and removed him across the street to Dr. Johnson's house. The engineer, then the superior officer of the train, telephoned the superintendent, reporting the accident, and asking for instructions as to the further proceeding of his train. He was directed to proceed to Clarendon and return, and was met on his return trip by the superintendent at Pine City. Campbell suggested that they go on to Clarendon and pick him up on the return trip. Upon reaching Holly Grove on returning, he was brought over on a cot and put in the baggage car; the attendants not being able to get the cot in the coach. The train then proceeded to Helena, doing the usual switching at the different stations; the employees handling it as carefully as possible and with as little jolting and jarring from switching, connecting, and disconnecting the train as was possible. It reached Helena between 8:00 and 8:30. Campbell was carried to his residence, where he was treated by Dr. Cox, the company physician. The next morning he was placed upon one of defendant's passenger trains and taken to the hospital at St. Louis, Mo. After reaching the station there, there was some delay of probably an hour before he was carried to the hospital. Upon arriving at the hospital, a physician examined him, unwrapped his feet, and took off his splints, and rewrapped them and put them in a wire basket. He was then put to bed, and about 9 o'clock the next morning the superintendent and chief physician examined him, and about 11 o'clock he was examined with X-rays. His father, who had accompanied him to St. Louis, testified that at this time his feet were black. He was then carried back to his ward and warm water in bottles was put around his legs. About 4 o'clock they took him to the operating room, punctured his feet, and put in some rubber drainage tubes to let out the bruised and black blood. He was then taken to his ward and suffered considerably, and finally went into convulsions and died at 7:30 the morning of Friday, the 25th, of delirium tremens. The physicians of the hospital testified after an autopsy was made by the medical assistant of the coroner, as required by law. The post mortem examination showed, "Cause of death oedema of brain and shock from injury."

Dr. Sylar, the company physician at Holly Grove, stated: "I made an examination of his injury, and there was a fracture

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and dislocation of the right ankle and dislocation of the left ankle. It was not possible for me to tell the extent of the fracture. The fibula bone was fractured about $1\frac{1}{2}$ or 2 inches above the articulation. I could discover no fracture of any other bone of the ankle. There was no abrasion of skin. Patient did not show any symptoms of shock whatever. Heart action and respiration were normal. I made the examination between 11 and 12 o'clock and was with him most of the time until about 2 o'clock. At that time he was at the residence of Dr. J. M. Johnson, on his front gallery. We took him out of the box car about 15 minutes after I got to the depot. I didn't think his injuries fatal. We removed him to Dr. Johnson's front porch and splintered his legs, gave him water, and a hypodermic to relieve the pain, and arranged him on a cot comfortably. He did not care for dinner. I gave him such treatment as is customary with physicians of this community as to injuries of similar character."

He told the engineer on the train to take it on to Clarendon, and that he would stay there until the train came back. Dr. Cox, the company physician at Helena, treated him about 8 or 9 o'clock that night. He took a couple of men with him and met the train. Campbell was on a cot and they unloaded him out of the car and carried him over to the house. There Dr. Cox unwrapped his bandages, loosened them, and rebound them, and left some tablets to give him. He came the next morning and went to the depot with Campbell on his trip to St. Louis.

It was also shown that 50 cents per month hospital fees was deducted from the wages of deceased by appellant; that such deductions were made from the wages of all employees for the support and maintenance of its hospital department for furnishing medical attention to its said employees when the occasion arose therefor. The deceased, after his injury was attended and treated by the company's physicians at Holly Grove, the place of the injury, and at Helena, his home, upon his arrival there, and its physicians in its said hospital at St. Louis, to which he was sent, all of whom were paid from said sums so derived and collected from the wages of its employees. There was some testimony tending to show negligence upon the part of the physicians in the treatment of his injuries in permitting him to be carried upon the local train to his home after the injury and on to St. Louis, instead of requiring absolute rest for him, and also by the physicians at the hospital there.

The expert witnesses for appellee, in answer to the hypothetical questions propounded to them, stated that deceased should have recovered from the injury and probably would have done so with proper treatment; that the indications were he died because of the delay in administering the right treatment; that

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he died of hyperemia of the brain and spinal cord, produced by a venous eclosion, which is an obstruction of the venous flow back from the injured part, caused by a restricted condition of a tight bandage or something of that kind; the obstruction of the blood causing a loss of its vitality and decomposition to set in, which produced hyperemia.

The court gave, among others, over appellant's objection, the following instructions, Nos. 1, 2, and 3:

"(1) You are instructed that if you find from a fair preponderance of the testimony, that the deceased, Jack Campbell, during the time he was in the employ of the defendant company, contributed monthly out of his salary for what is known as hospital dues, and if you further find that it was agreed and understood by and between the deceased and defendant that the payment of such dues entitled him to surgical and medical care and attention in event of his being injured in the course of his employment, then it was the duty of the defendant to use reasonable care to provide Jack Campbell, the deceased, with such medical and surgical attention and within such times as is usually and ordinarily provided by physicians in the several communities in which he was treated for such injuries.

"(2) You are instructed that, if you find from a fair preponderance of the testimony in this case that the proximate cause of the death of the deceased, Jack Campbell, was the failure on the part of the defendant to use reasonable care to provide such medical and surgical care and attention, and at such times as are usually and ordinarily given by physicians in the localities in which he was treated, to injuries of the kind described by witnesses in this case, then your verdict will be for the plaintiff.

"(3) You are instructed that, if you find from a fair preponderance of the testimony in this case, that the deceased, Jack Campbell, would have recovered if he had received such medical and surgical care and attention, and at such times as are usually and ordinarily given to injuries of the kind described in evidence in this case by physicians in the localities in which he was treated, then your verdict will be for the plaintiff."

And for it, out of 21 instructions asked, all but 5; among the number given being 16, which reads: "(16) Even though the hospital at St. Louis, and the local surgeons at different points upon the railway system of defendant, are maintained by small sums of money deducted monthly from the wages of the employees of defendant, yet the only duty which the defendant owed its employees in regard to medical and surgical attention was to use reasonable care in the selection of physicians, surgeons or attendants."

The jury returned a verdict for \$15,000 upon the first para-

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graph of the complaint for the widow and next of kin, and \$5,000 upon the second, for the benefit of the estate, upon which judgment was rendered; and from which this appeal is brought.

W. E. Hemingway, E. B. Kinsworthy, S. D. Campbell, and Jas. H. Stevenson, for appellants.

Fink & Dinning, for appellee.

KIRBY, J. (after stating the facts as above). [3] It is insisted by appellant that it was not maintaining its hospital department and employing physicians with the expectation of deriving any gain or profit therefrom, and that it was only liable, in furnishing medical attention to deceased, to use reasonable and ordinary care in the selection of competent and skilled physicians to administer it, and not for the negligence or malpractice of such physicians so selected; and by appellee that since said railroad company employed its physicians and maintained and supported its hospital by deductions made from the wages of its employees, without regard to their consent thereto, in fact, assuming, for pay taken from its said employees, to furnish them proper medical and surgical attention, and that it was bound to answer for the negligence of its said physicians in their treatment of such employees. This question is for the first time before our court, and it has been decided differently by the courts of other jurisdictions. A physician cannot be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily cannot be directed in the diagnosing of diseases and injuries and prescribing treatment therefor; his office being to exercise his best skill and judgment in such matters, without control from those by whom he is called or his fees are paid. It is generally held that [1] hospitals conducted for charity are not responsible for the negligence or malpractice of their physicians, and that persons and [2] hospitals who treat patients for hire, with the expectation and hope of securing therefrom gain and profit, are liable for such negligence and malpractice on their part.

It is alleged in this case that deductions were made monthly from the salary of the intestate, as required by the rules and regulations of the company, "for the support and maintenance of the hospital department of said company, and in return for such monthly payments or assessments it was understood by and between said company and said Campbell that he should receive proper medical and surgical attention, to be supplied and furnished by said defendant whenever the emergency and necessity for said medical and surgical attention arose."

There was no allegation that such hospital department was conducted for gain or profit to the company, and no proof showing that any such gain or profit resulted to it because of such deductions from the wages of its employees, over and above the

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maintenance and support of said hospital department, and the company denied any understanding or agreement on its part to furnish proper medical attention for the deductions made.

It could not be said to be conducted as a charity, for only those employees who had contributed the fees deducted from their wages for its maintenance were entitled to enter there for treatment, and all the physicians and employees required to maintain and operate it were paid from such fund. Nor can it be said to have been administered by the railroad company out of pure philanthropy since it may have had some benefit therefrom in decrease of amount of damages for injuries caused in the operation of the road, and the better and more efficient service to the company of its employees because of its maintenance. It is also true that none of the employees are required to accept the treatment provided at said hospital, and cannot do so unless before their service with the railroad company is ended, thus in effect creating a fund for the benefit of themselves, it may be, and certainly for others; for how few of all those contributing thereto received any personal benefit therefrom, and how small a part of the expense of caring for an injured employee was actually paid by him, to provide hospital accommodations and medical skill and attention, to relieve pain and suffering and restore health, without any hope of any other profit or gain upon their part, and without any purpose upon the part of the company in the deduction of the fees from their wages and collecting such fund, other than to administer it for the support and maintenance of the said hospital department as alleged, and without any gain or profit therefrom to it, so far as the testimony in this case shows. It was not contemplated by such employees in their contribution to this fund that it should be used in the payment of damages for the negligence or malpractice of physicians employed in the operation of such department, and certainly the railroad company that assumed gratuitously to collect and preserve such fund and provide hospital accommodations and competent physicians and surgeons to operate it, without profit or gain or hope thereof therefrom, should not be required to pay damages for such negligence or malpractice; it being no part of its business under its charter to maintain a hospital. At most it can only be considered a trustee for the proper administration and expenditure of such fund, and should be held only to ordinary care in the selection of competent and skillful physicians to administer relief and provide attention to sick and injured employees. *Union Pac. R. R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; *Big Stone Gap Co. v. Ketron*, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; *Texas Central R. R. Co. v. Zumwalt* (Tex.) 132 S. W. 113; *Louisville & Nashville R. R. Co. v. Ford*, 104 Ky. 456, 47 S. W. 342; *Cummings v. C. & N. W. Ry.*, 89 Ill. App. 199; *Id.*, 189 Ill. 608, 60

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N. E. 51; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 533, 1 L. R. A. 417, 6 Am. St. Rep. 745.

It follows that the instruction No. 16, given on the part of appellant, was a correct statement of the law, defining the care required of it in the selection of competent and skilled physicians, and that said instructions 1, 2, and 3, being in conflict therewith and requiring a different and higher degree of care of the railroad company, and holding it responsible for negligence and malpractice on the part of physicians employed for its hospital department and treatment of employees, were erroneous, and should not have been given.

2. If the railroad company did in fact realize a profit from the total deductions from the wages of its employees for the hospital fund, after paying for the support and maintenance thereof and the employment of physicians, or if it agreed and contracted with such employees in consideration of the fees paid by them to furnish proper medical attention, the rule might be different. No such contract of employment to furnish medical attention for such consideration was shown to exist, nor was it shown that the funds so collected amounted to more than the expenses of carrying on said hospital department, nor that any of such fund was used by the railroad company. The testimony of the chief surgeon as to the receipt and disbursement of the funds, same being paid out by his direction, that it was for the maintenance of hospital and emergency hospitals for treating sick and injured employees, and not for gain or profit—"The funds so derived are used solely for that purpose"—was competent, and should not have been withdrawn.

[4] There was no error in permitting the hypothetical questions to be asked. In *Missouri & North Arkansas R. R. Co. v. Daniels*, 136 S. W. —, the court said: "In propounding a hypothetical question to an expert witness, the data upon which it is based need not cover all of the facts which have been proved in the case. The party offering the testimony may select such facts as he conceives to have been proved, and predicate his hypothetical question thereon." And in *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405: "The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence, or any part thereof, and it is not necessary that the facts stated as established by the evidence should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective, if there be any evidence tending to prove such facts."

For the errors indicated, the judgment is reversed, and the cause remanded.

FLAHERTY v. BUTTE ELECTRIC RY. Co. et al.

(Supreme Court of Montana, March 29, 1911.)

[115 Pac. Rep. 40.]

Pleading—Amendment—Right to Amend.—Amendments are allowed with great liberality under the statute, if they do not change the nature of the action or mislead the adverse party to his prejudice.

Pleading—Amendment—New Cause of Action.—In an action for damages against a street car company for striking plaintiff's child, the original complaint alleged negligence by the motorman in failing to stop the car before striking the child, and the amended complaint alleged negligence in failing to keep a proper lookout, whereby he could have seen the child and avoided the injury. Held, that the amended complaint did not state a different cause of action from that originally alleged, and was properly allowed.

Master and Servant—Master's Liability—Theory of Liability.—Under the rule respondeat superior, to charge one for another's negligent act, the person charged must be the superior to him doing the negligent act.

Master and Servant—Injuries—Allegations of Complaint—Relationship.—In alleging the relationship of master and servant, the complaint need only allege those facts necessary to be proven in order to establish such relationship.

Master and Servant—Action—Evidence—Relationship.—That a vehicle, street car, etc., by the negligent management of which plaintiff was injured, was in charge of a certain person when he was injured is prima facie evidence that such person was the servant of the owner.

Master and Servant—Liability to Third Person—Allegations of Complaint—Relationship.—In an action against a street car company for injuries by striking a child on the track, the complaint alleged that at the time and place of the injury a certain person was in charge of one of defendant's cars as conductor, and was driving the car as motorman, and not acting in his usual capacity as conductor, doing so with defendant's knowledge and consent. Held, that the complaint sufficiently alleged that such person was defendant's servant at the time of the injury, so as to make applicable the rule of respondeat superior.

Street Railroads—Injuries—Negligence.*—A motorman must exercise reasonable and ordinary care to discover persons on or near the track in time to avoid injuring them, and is negligent for his failure to do so.

Street Railroads—Negligence—Action—Allegation—Proximate Cause.—Allegations of the complaint, in an action against a street

*See first foot-note of *Welsh v. Tri-City Ry. Co.* (Iowa), 37 R. R. R. 398, 60 Am. & Eng. R. Cas., N. S., 398.

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car company for injuries to a child on the track, that the motorman was negligent in failing to keep a proper lookout, and "that by reason of the negligence of said defendant" plaintiff was injured, sufficiently alleged the motorman's negligence as the proximate cause of the injury.

Street Railroads—Injuries—Action—Jury Question—Unavoidable Accident.—Where, in an action for injuries by being struck by a street car, the evidence was sharply conflicting as to whether the motorman's vision of the injured person was unavoidably obscured, the question of whether the injury was unavoidable was for the jury.

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Action by Wilfred H. Flaherty, by Laura S. Flaherty, his guardian ad litem, against the Butte Electric Railway Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and remanded for a new trial, unless a remittitur is filed, in which case judgment is affirmed as modified, and the order denying a new trial is affirmed.

W. M. Bickford, Geo. F. Shelton, Peter Breen, and Chas. A. Ruggles, for appellants.

J. E. Healy, M. F. Canning, and Canning & Keating, for respondent.

HOLLOWAY, J. A statement of the facts of this case will be found in the opinion upon the former appeal. *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630. Upon the return of the cause to the district court, plaintiff amended his complaint, and the issues being joined a trial was had, which resulted in a verdict and judgment in his favor for \$25,000. Defendants have appealed from the judgment and from an order denying them a new trial.

[2] The complaint as originally drawn charged negligence in the operation of the car which resulted in the injury, particularly in that Le Sage, the motorman at the time, failed to turn off the electric current, apply the brakes, and stop the car before striking the child. Upon the former appeal we held that the evidence failed to prove the specific act of negligence thus pleaded. The amendment made to the complaint consists in substituting for the allegation of the specific act of negligence in failing to apply the brakes, etc., an allegation that Le Sage failed to keep any vigilant or proper lookout, whereby he might have seen the child and avoided the injury. It is now insisted that the so-called amendment was in fact the substitution of a different cause of action.

[1] There cannot be any question as to the general rule of law applicable in such cases. In *Leggat v. Palmer*, 39 Mont. 302,

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102 Pac. 327, this court said: "Under the statute, to allow amendments is the rule; to deny them is the exception. The rule observed by this court has always been to allow them with great liberality, where they do not change the nature of the action, or mislead the adversary to his prejudice; its application going even to the extent of permitting them after verdict and judgment." The only difficulty arises in applying the rule to the facts of the particular case. "To constitute a cause of action for a tort, then, the plaintiff's right must have been infringed by the wrongful act of the defendant, with the result that plaintiff suffered damages." *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. It is alleged in the original and also in the amended complaints that the negligence of the defendants in operating the car caused the injury. May the plaintiff, then, substitute as the charging part of his complaint one specific act of negligence for another, without introducing a different cause of action?

In *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197, the original complaint charged that the injury resulted from negligence of the city in permitting a sidewalk to be constructed in a dangerous manner. The amendment charged that the negligence consisted in permitting the sidewalk to remain in a dangerous condition after the city had notice. It was held that this amendment was properly allowed.

In *Peery v. Quincy, O. & K. C. R. Co.*, 122 Mo. App. 177. 99 S. W. 14, the original complaint charged that the negligence consisted in failing to keep a fence in repair. The amendment charged negligence in maintaining a defective gate. The allowance of this amendment was held proper.

In *Chapman v. Nobleboro*, 76 Me. 427, the pleading is not set forth, but in disposing of the objection to the amendment the court said: "The first of the amendments is, not a change in, but an addition to, the description of the alleged defect in the way, and the second relates to the manner in which the accident happened, leaving the accident itself and the result of it the same. There is therefore no change in the cause of action, either in the alleged defect or the result of it, and the allowance of the amendments was within the discretion of the presiding justice."

In *Davis v. Hill*, 41 N. H. 329, the original declaration charged negligence in permitting a roadway to be uneven and incumbered with snow and ice, by reason whereof the injury resulted. The amendment charged negligence in failing to maintain a railing or barrier along the road, by reason of which the injury resulted. It was held that this amendment was properly allowed.

In *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 South. 136, 9 L. R. A. (N. S.) 851, the original complaint charged that plaintiff was wrongfully ejected from a street car

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on the South Street line by the conductor of the car. The amendment charged that the conductor on the Electric Park line negligently tore and mutilated plaintiff's transfer ticket, by reason whereof he was ejected by the conductor of the Court Street line. It was held that this amendment was proper.

In *Salmon v. City Electric Ry. Co.*, 124 Ga. 1056, 53 S. E. 575, the original complaint charged negligence on the part of the railway company in placing certain poles too near the track. The amendment offered charged negligence on the part of the conductor in failing to warn the plaintiff of the proximity of the poles to the track. It was held error to refuse the amendment.

In *Smith v. Bogenschultz*, 19 S. W. 667, 20 S. W. 390, 14 Ky. Law Rep. 305, the original complaint charged that plaintiff's injury was caused by the jostling of a ladle containing molten iron, occasioned by the narrowness of the passageway through which the ladle had to be carried. The amendment charged that the injury resulted from the negligence of defendant in furnishing a defective ladle. It was held error to refuse the amendment.

In *City of Evanston v. Richards*, 224 Ill. 444, 79 N. E. 673, the original declaration pleaded negligence on the part of the city in permitting certain boards in a sidewalk to become loose, whereby plaintiff tripped and fell. The amendment charged negligence in permitting the sidewalk to remain in an unsafe condition, by reason whereof plaintiff stepped upon and broke through a defective board, thereby sustaining the injury. It was held proper to allow the amendment, and in the course of the opinion the court said: "In the case at bar the act or wrong charged was the disregard by the appellant of its duty to keep its sidewalk in safe repair, and in permitting it to be and remain in bad and unsafe repair and condition. In the original declaration the pleader stated the manner in which the condition complained of resulted in the injury to appellee. Upon the trial the proof tended to show the condition complained of was as alleged in the declaration, but that the manner of appellee's injury was not as alleged, but in the manner stated in the amendment. The act or wrong of appellant which resulted in the injury was the same in the original declaration as charged by the amended declaration; the mode or manner in which it resulted in the injury was stated differently."

The theory of all these cases is that, so long as the plaintiff adheres to the injury originally declared upon, he may amend his pleading by alleging that the injury was caused in a different manner, without infringing the general rule against introducing a different cause of action. 1 Ency. Pl. & Pr. 564.

In *More v. Burger*, 15 N. D. 345, 107 N. W. 200, it is well said: "The test generally adopted to determine whether an amendment is permissible is whether a recovery upon the cause of action set up by the amendment would be a bar to a suit upon

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the other." The same injury is described in the original and in the amended complaint in this instance, and relief for that injury is sought in each pleading. The measure of damages is the same in each instance, and that a judgment recovered upon either pleading would bar recovery upon the other admits of no doubt. We approve the action of the district court in allowing the amendment, as well within the rule heretofore announced by this court.

[3] 2. It is insisted that the complaint does not state a cause of action against the railway company. It must be admitted at once that the liability of the railway company for the negligent act of Le Sage is grounded in the rule respondeat superior, and in order for that rule to apply the person sought to be charged must stand in the relation of superior to the person doing the wrongful act. 1 Thompson's Commentaries on the Law of Negligence, § 578; *King v. New York Central & H. R. R. Co.*, 66 N. Y. 184, 23 Am. Rep. 37; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703. It is urged that the complaint in this instance does not allege that Le Sage was a servant of the railway company; and while the allegation in express terms cannot be found in the amended complaint, and its absence is scarcely excusable, still, if there are sufficient facts alleged from which such relationship may fairly be inferred, we will not feel justified in reversing the judgment.

[6] The complaint alleges that at the time of the injury the defendant railway company was the owner of, and operating, street cars on West Park street in Butte, for the purpose of transporting passengers from point to point in the city; that at such time and place Le Sage was in charge of one of said cars, in the capacity of conductor; that at such time and place the car so in charge of Le Sage was proceeding along West Park street between Columbia and Crystal streets; "that the defendant Le Sage was driving said car as motorman, and not acting in his usual and regular capacity as conductor on said car, doing so with the knowledge and consent of the defendant corporation." In each of the separate answers filed by the defendants, these specific allegations are admitted.

[4] In attempting to charge the relationship of master and servant, it must be conceded that it is not necessary to plead any facts other than those necessary to be proven, in order to establish such relationship when in issue.

[5] In 1 Shearman & Redfield on the Law of Negligence, § 158, it is said: "When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant."

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In 1 Thompson's Commentaries on the Law of Negligence, § 580, the same rule is announced as follows: "So it is not necessary to prove an express contract of employment in order to establish the relation of master and servant, but the relation may be implied from circumstances, as where the person committing the wrong is at the time in the actual conduct of the business of another with his seeming consent, in which case that other will be responsible for the wrong done by the former within the scope of the apparent employment, on the ground that he has induced the belief that such person is his servant, and has led another to act upon that belief to his injury." To the same effect are *McCoun v. New York Central & H. R. R. Co.*, 66 Barb. (N. Y.) 338; *Growcock v. Hall*, 82 Ind. 202; *Norris v. Kohler*, 41 N. Y. 42. Even though this complaint may not be a model pleading, we think it fairly appears from it that Le Sage was the servant of the railway company at the time of the injury, and that the rule of respondeat superior is properly invoked.

3. It is insisted, also, that the complaint fails to state facts showing a breach of duty on the part of defendants, and also that the negligence alleged was a proximate cause of the injury. The complaint alleges, and the answers admit, that the car was being operated in a public and much-used street in the city of Butte. From this fact it follows that the defendants were under the obligation or duty to keep a vigilant lookout for people who might be rightfully using the street.

[7] The general rule, with the authorities supporting it, is found stated in 36 Cyc. 1520, as follows: "It is the duty of the driver or motorman of a street car to exercise reasonable and ordinary care to discover persons using the street on or near the track, and liable to be injured by his car, in time to avoid injuring them, and if he fails to discover a person on or near the track, when by the exercise of ordinary care he could have done so in time to stop the car or otherwise avoid the injury, it is negligence for which the company is liable."

The complaint alleges that Le Sage, the motorman, at the time failed to keep a vigilant or proper lookout, whereby he might have seen the child before it came into a place of danger. We think the complaint contains a sufficient statement of the duty and breach.

[8] The only specific act of negligence charged is in failing to keep a proper lookout; and the complaint then proceeds: "That by reason of the negligence of said defendants he [plaintiff] was injured." This is a sufficient showing of the causal connection between the alleged act of negligence and the injury. *Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659. See, also, same case in 16 Am. & Eng. Ann. Cas. 1189, and note; *Reino v. Montana Min. Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853.

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[9] 4. Without reviewing the evidence at length, we think it sufficient to go to the jury upon the question of Le Sage's negligence in failing to keep a proper lookout, and that a verdict was justified if the plaintiff's evidence was treated as true, as it must have been. We cannot agree with counsel for appellants that the evidence is subject to but one construction, viz., that the child appeared on the track under such circumstances as to make its injury unavoidable. There is a sharp conflict in the evidence as to whether a wagon passed the car immediately before the injury happened, or whether there was a dust storm which might have interfered with Le Sage in attempting to keep a lookout; and under these circumstances it was proper to submit to the jury the question whether or not the injury was or was not unavoidable. *Harrington v. Butte, Ananconda & Pac. Ry. Co.*, 39 Mont. 299, 102 Pac. 330.

5. It is insisted that the verdict returned in this instance is grossly excessive. It has been well said: "To ascertain what is a fair and just compensation for a personal injury is a judicial problem of difficult, if not impossible, solution." In the note to *Cleveland, etc., R. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, as reported in 16 Am. & Eng. Ann. Cas. 1, there is a most complete collation of cases involving personal injuries. The cases are carefully analyzed and classified according to the character of injury and the action taken by the appellate court. A review of those cases involving an injury of the character suffered in this instance discloses that, except in New York and Texas, in every instance where the verdict exceeded \$15,000 it has been disapproved, and that in nearly every instance the amount has been reduced to \$12,500, or less. While the views of these courts are not binding upon us, they at least indicate in a general way the prevailing opinion as to the reasonableness of verdicts in this class of cases. Considering all the facts and circumstances as disclosed by this record, we think a recovery of \$12,500 will compensate for the injury sustained, assuming, as we must, that it is possible to measure in money the extent of an injury which deprives a person of one member of his body.

It is ordered that this cause be remanded to the district court, with directions to grant a new trial, unless within 30 days after the remittitur is filed, and plaintiff has notice thereof, he shall file with the clerk of the district court his consent in writing that the amount of the judgment be reduced to \$12,500 as of the date of the filing of such writing. If such written consent be filed within the time designated, then the judgment shall be modified accordingly, and as modified shall stand affirmed, and under those circumstances the order refusing a new trial will also be affirmed, with costs to respondent.

BRANTLY, C. J., and SMITH, J., concur.

HORGAN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, March, 3, 1911.)

[94 N. E. Rep. 386.]

Carriers—Passengers—Misconduct of Agents.—One entering the subway station of an elevated railway company and paying his fare, with the intention of becoming a passenger, is lawfully on the premises; and if, while passing through the turnstile to take a car, its servants unlawfully molest him by physical restraint, the company is liable for the injury.

False Imprisonment—Liability of Carrier—Misconduct of Agents.*—A carrier may not escape liability for the false imprisonment of a passenger, by its servants acting as special police officers, under St. 1898, c. 282, § 2, authorizing the appointment of special police officers, but making the carrier liable for their official misconduct to the same extent as for other torts, when acting as servants.

False Imprisonment—Illegal Arrest—"Complaint."—Under Rev. Laws, c. 212, § 36, authorizing the arrest without warrant for drunkenness in a public place, and St. 1905, c. 384, § 1, requiring an officer arresting one for drunkenness without warrant to make complaint to the court having jurisdiction of the offense, the arrest is only preliminary; and, though "complaint" means the oral allegations by the officer, which are reduced to writing in proper form by the magistrate or court, the officer is liable to an action for assault and false imprisonment, unless he makes the complaint.

Evidence—Presumptions—Official Acts.—Where one arrested by a police officer for drunkenness was, on his arrival at the police station, charged by the officer with drunkenness, the court, in an action against the officer for false imprisonment, will presume, in the absence of any qualifying statement, that St. 1905, c. 384, § 1, requiring an officer making an arrest for drunkenness to make complaint to the court having jurisdiction of the offense, was followed.

False Imprisonment—False Arrest—Burden of Proof.—One suing for false imprisonment, based on his arrest for drunkenness, followed by his discharge without arraignment after the officer making the arrest had made complaint to the court having jurisdiction of the offense, has ordinarily the right to go to the jury on the question whether, when arrested, he was intoxicated, with the burden of proof on the officer to justify the arrest.

False Imprisonment—False Arrest—Waiver.—Under St. 1905, c. 384, § 1, requiring an officer arresting without a warrant for drunkenness to make a complaint to the court having jurisdiction of the

*For the authorities in this series on the question whether railroad companies are liable on account of arrests or prosecutions made or instigated by their employees or agents, see foot-note of St. Louis, etc., Ry. Co. v. Hudson (Ark.), 37 R. R. R. 788, 60 Am. & Eng. R. Cas., N. S., 788; first foot-note of Baltimore & O. R. Co. v. Strube (Md.), 37 R. R. R. 319, 60 Am. & Eng. R. Cas., N. S., 319.

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offense, authorizing accused to make a statement in writing, and request his release from custody, and providing that the officer making the arrest shall not be liable for illegal arrest or imprisonment if accused is released on such request, a person arrested for drunkenness, who voluntarily, and with full opportunity to know the facts, asks in writing for his release, and who thereby obtains his release, waives any claim for damages which otherwise he might have had against the officer making the arrest without a warrant, and the officer may not be prosecuted for false imprisonment.

Release—Joint Torts—Discharge of One Tort-Feasor—Effect.

Where a tort is joint, and the person injured discharges one of the wrongdoers, he may not hold the other.

Carriers—False Imprisonment—Release—Misconduct of Servants.

—Where the servant of a carrier, acting as a special police officer, under St. 1898, c. 282, is not liable to one for false imprisonment or for assault and battery, or he has been released from liability, the carrier is exonerated from liability.

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by William J. Horgan against the Boston Elevated Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

This was an action of tort to recover for an alleged assault and battery and false imprisonment, committed by defendant's agents and servants in a station of defendant.

Coakley & Sherman and William Flaherty, for plaintiff.

E. P. Saltonstall and A. M. Beale, for defendant.

BRALEY, J. The verdict for the defendant was ordered at the close of all the evidence, but as the jury could have disbelieved the defendant's witnesses so far as their testimony was material, the question is whether, upon the plaintiff's own narrative, he could prevail. Having entered the subway station of the defendant, and paid his fare with the intention of becoming a passenger, the plaintiff was lawfully on the premises, and if, while passing through the turnstile to take a car, its servants unlawfully molested him by physical restraint, the defendant is responsible for the injury. *Lockwood v. Boston Elevated Railway*, 200 Mass. 537, 544, 86 N. E. 934, 22 L. R. A. (N. S.) 488; *Jackson v. Old Colony Street Railway*, 206 Mass. 477, 92 N. E. 725. Nor can the corporation escape liability even if they acted as special police officers appointed under the provisions of St. 1898, c. 282. By section 2 the defendant is made liable for their official misconduct, to the same extent as for their torts when acting as its employees. The plaintiff testified that two of the defendant's servants, one of whom was a special police officer, took him into custody, and brought him to the police station

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where he was charged by the officer with the offense of drunkenness. If the plaintiff was found intoxicated in a public place, "or * * * any place * * * disturbing others by noise," he could be arrested by a police officer without a warrant, and no question seems to have been made by the plaintiff at the trial, nor does he now contend, that the arresting officer was not qualified to act, or that the railway station was not a public place. *Rev. Laws*, c. 212, § 36; *Short v. Symmes*, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

St. 1905, c. 384, § 1, which was inserted by the Legislature in place of *Rev. Laws*, c. 212, § 37, governing proceedings after arrest for drunkenness without a warrant, required the officer to make complaint to the court having jurisdiction of the offense. The arrest is only preliminary, and although "complaint" means the oral allegations by the officer which are to be reduced to writing in proper form by the magistrate or court, the officer is liable to an action for assault and false imprisonment unless he complies with the requirement. *Hobbs v. Hill*, 157 Mass. 556, 32 N. E. 862; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390. But the plaintiff having admitted that when he arrived at the police station he was charged by the officer with "the crime of drunkenness," it is to be presumed, in the absence of any qualifying statement, that the statute was followed. No further steps were taken to bring him before the court, and having been discharged without arraignment or trial, the plaintiff ordinarily would have the right to go to the jury on the question whether when arrested he was intoxicated, with the burden of proof on the defendant to justify the arrest. *Phillips v. Fadden*, 125 Mass. 198; *Hathaway v. Hatchard*, 160 Mass. 296, 35 N. E. 857. The statute, however, while guarding against the abuse of criminal process, also confers the privilege on the party arrested after recovering from his intoxication to procure his discharge without the publicity of a trial. He may ask in writing for his release, and after certain preliminaries are complied with, the officer for the time being in charge of the place of detention may forthwith discharge him. St. 1905, c. 384, § 1. The paper put in evidence during the cross-examination of the plaintiff, and signed by him, was in terms such a request. It is not contended by the plaintiff, that his signature was produced by fraud, or coercion, or that any attempt was made to conceal any material portion of the paper, or that he was illiterate, and did not have full opportunity to acquaint himself with its contents. The instrument having been voluntarily and intelligently presented by him as his own act, and his discharge thereby obtained, the plaintiff ought not to be permitted to set it aside after the releasing officer acted in reliance upon the statute. *Trambly v. Ricard*, 130 Mass. 259, 260, 261; *McNamara v. Boston Elevated Rail-*

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way, 197 Mass. 383, 83 N. E. 878. It is not only expressly provided by St. 1905, c. 384, § 2, that if the person arrested is released at his request the officer who took him into custody shall not be liable for an illegal arrest, or imprisonment, but settled law that if a party voluntarily asks to be freed from an arrest without arraignment, and his discharge follows, he impliedly waives any claim for damages which otherwise he might have had against the officer. *Caffrey v. Drugan*, 144 Mass. 294, 11 N. E. 96; *Joyce v. Parkhurst*, 150 Mass. 243, 247, 22 N. E. 899; *Bates v. Reynolds*, 195 Mass. 549, 81 N. E. 260.

The wrong also was participated in by another employee of the defendant who was not a police officer. But the tort being joint, the plaintiff at common law having discharged one of the wrongdoers could not hold the other. *Brewer v. Casey*, 196 Mass. 384, 388, 389, 82 N. E. 45. If for the reasons stated the plaintiff could not prevail in a suit against the officer, or the officer's fellow servant, he cannot recover against the defendant. The carrier, when sued for an assault by the carrier's servant upon a passenger, may prove in justification that the servant could not have been held liable, or has been released, and if the servant was not responsible in damages, the carrier also is exonerated. *Jackson v. Old Colony Street Railway*, 206 Mass. 477, 92 N. E. 725; *New Orleans & Northeastern Railroad v. Jope*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919.

Exceptions overruled.

ST. LOUIS, I. M. & S. RY. CO. v. FUNK.

(Supreme Court of Arkansas, April 3, 1911.)

[136 S. W. Rep. 655.]

Master and Servant—Injury to Servant—Contributory Negligence—Question for Jury.*—Whether a switch tender, injured while boarding a moving engine, was guilty of contributory negligence in standing on the track in front of the approaching engine, instead of standing on the side of the track and mounting the gangway between the engine and tender, held, under the evidence, for the jury.

Master and Servant—Injury to Servant—Contributory Negligence.†—A switch tender, whose duty it is to board a moving engine, may

*For the authorities in this series on the subject of contributory negligence of railroad employees in boarding moving trains, locomotives, or cars, see foot-note of *Pratt v. Southern Ry. Co. (Ala.)*, 35 R. R. R. 751, 58 Am. & Eng. R. Cas. N. S., 751.

†For the authorities in this series on the question whether a person injured through the negligence of another had the right to assume that the latter had performed or would perform the duties owing to the person injured, or whether it was his duty to antici-

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rely on the performance by the engineer of his duty to reduce the speed on signal, and, where he discovers the failure of the engineer to do so, he is confronted with an emergency calling for the exercise of judgment.

Master and Servant—Injury to Servant—Contributory Negligence—Question for Jury.—In an action for injuries to a switch tender while boarding a moving engine, evidence held to support a finding that he was not guilty of contributory negligence in failing to discover that the engineer had disregarded the signal to slow down until the engine was so close as to confuse him, nor in boarding the engine under the circumstances.

Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

Action by Willard Funk against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit for damages for personal injuries resulting from appellee's having been thrown violently against the front of the engine, upon attempting to mount the pilot thereof in the discharge of his duty.

Complaint alleged "that he was a switch tender in the Union Station yards in Little Rock, and it was his duty to care for switches and keep them lined up for trains going in and out; that it was customary, and a part of his duties, to ride the engine from one part of the yard to the other; * * * that on the morning of the 10th of February * * * he was at the south end of the yards in Little Rock, in the performance of his duty, to receive train No. 4; and, it being necessary to go to the other end of the yards, as was his custom and duty, he, being on the track in front of the engine of said train for the purpose of stepping upon the pilot of said engine to ride to the other end of the yards, * * * gave the engineer the signal to slow down and pick him up; that said engineer failed to obey said signal and slow down, as was his duty, and, said engine being too close for

pate negligence on the part of the other, see last foot-note of St. Louis, etc., R. Co. v. Carr (Ark.), 37 R. R. R. 92, 60 Am. & Eng. R. Cas., N. S., 92; first head-note of Norris v. Atlantic C. L. R. Co. (N. Car.), 36 R. R. R. 321, 59 Am. & Eng. R. Cas., N. S., 321; last head-note of Campbell v. Chicago G. W. Ry. Co. (Minn.), 35 R. R. R. 98, 58 Am. & Eng. R. Cas., N. S., 98.

For the authorities in this series on the question whether a railroad employee has the right to assume that his master or the latter's representative has performed or will perform its duties to him, see foot-note of Redmond v. Quincey, etc., R. Co. (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283; second head-note of Pittsburg, etc., Ry. Co. v. Schaub (Ky.), 36 R. R. R. 644, 59 Am. & Eng. R. Cas., N. S., 644; first head-note of Smith v. Chicago, etc., Ry. Co. (Kan.), 36 R. R. R. 640, 59 Am. & Eng. R. Cas., N. S., 640.

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him to leave the track in safety when he discovered that the engineer had refused to obey his signal, * * * was caught by the pilot of said engine, and was thrown against the drawhead of said engine with great force and violence, permanently injuring him internally, and rupturing him at the lower extremities of the bowels," etc. Appellant answered the complaint, denying all the material allegations, and pleaded contributory negligence and assumed risks as affirmative defense thereto.

The testimony tended to show that Willard Funk, appellee, was 21 years of age, living in Little Rock, Ark. He began work for the company first as train caller, and in July or August prior to the accident he was bridge watchman for trains, stationed at one end of the bridge over the Arkansas river, and sending trains across the bridge upon signal from the other end that it was clear. That he worked as such watchman until December, when he was transferred to the yard as highball man, where his duties were to bring trains into the yards and see that passenger trains got in on the right track, line up switches, cut baggage car off, etc. On the morning of his injury, the El Dorado train went out south at 8:22 and train No. 4, north-bound, came in at 8:25; appellee holding No. 4 south of the Rock Island crossing until the El Dorado train got out, when he would give signal to No. 4 to come in. It was his duty to ride this latter train up beyond the station, take off the engine, put on a new engine, line up all switches, and "give it a clear shoot for St. Louis." He had been acting as highball man for two months, from 5:30 a. m. until 6:00 p. m. daily, and riding the pilot of engine on No. 4 all the time; as a rule riding it every other morning. Engineer Fitzgerald, in charge, never came through at over four or five miles an hour. Appellee would get out on the track where he could be seen, and the engineer had always slowed up. He stated that on the morning in question he was standing on the side of the track and gave the usual signal, while the engineer was looking straight at him for about 200 yards. He gave the signal to both fireman and engineer, and continued until the engine came right on up to him. It got so close to him before he realized that it was going so fast that he did not know what to do. After he realized the engine was not going to stop, he was afraid to attempt to leave the track lest the pilot beam should strike him or his foot slip, and concluded to jump the pilot and take the chances, which he did, and was thrown up, and his stomach came down on the bumper, and his wrist was sprained. Seeing that the engine was not going to stop, he jumped off or sort of rolled off, lighting on his feet, and then walked up in the yards. Formerly the same engineer had run up rather close to him and then stopped his train suddenly, when he would step on and give him the highball, and the train would proceed. He knew it was dangerous to be in front of the moving train, but

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was not taking a chance, if the engineer had slowed up, as he generally did. That Fitzgerald, the engineer, was running between 12 and 15 miles an hour, and had his hand on the air brake at the end of the yard when he was about 250 feet away, and appellee gave him the signal, and then walked over and gave it to the fireman. Appellee judged that he was coming 10 or 12 miles an hour, and could not tell how fast he was coming when he got closer—no one could—and was expecting the engineer to stop every minute; that he had been riding the same engine every day for two months, and rode on an average four or five a day. He watched this train all the time for 250 feet after he gave the slow-up signal, and it was not as far as 20 feet from him when he first discovered it was going to slow down. Fitzgerald was not working steam before he reached appellee, but when appellee hit the engine he "pulled her open."

It is conceded that the testimony was sufficient to sustain the finding that it was the duty of appellee to mount the pilot of the incoming engine as alleged. The fireman testified that Engineer Fitzgerald was in charge, and that appellee was known to them as highball man in the yards, and that this was his duty and habit to board the engine and ride it to the depot. Sometimes he would step on the pilot and sometimes in the gangway; the engineer reducing the speed. That appellee was standing out on the track, with his arms extended, giving the signal to reduce speed, some 200 feet ahead of the train, which was approaching at the rate of 12 or 15 miles an hour, and the engineer should have reduced the speed sufficiently for him to have boarded the engine in safety. Did not notice him doing anything to reduce the speed. That he could have seen appellee at least 100 feet ahead. He also testified that he could tell whether an approaching engine was coming fast or slow enough to board it, and any experienced man could. That a man standing as appellee was could have escaped from the engine when it was within 50 feet of him; that he never stood on a track until an engine ran within 50 feet of him, but believed he could stand on the track and tell whether the train got under 10 miles an hour at that distance.

The superintendent of the Arkansas division testified that there was nothing more dangerous than for a man to attempt to step on pilot when moving, because there was just a chance whether he fell from the side or the other; that a man could tell whether an engine was coming fast or slow when it was within 50 feet of him; that any man could tell approximately the speed of an engine when it got within 100 feet of him, and his ability to determine the speed increases as it comes nearer. He could not see how any man could fail to know whether an engine was coming too fast for boarding, if he was looking at it.

A switchman standing 35 feet north of where Funk was injured saw the engine approaching appellee, standing near the

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middle of the track, giving a slow signal. The engine was running at such speed that witness with his experience would not have attempted to get on. Appellee fell over against the pilot beam, and thereafter dropped off and picked up his hat. Witness considered his mounting the engine a piece of foolishness, and also to appellee condemned vigorously the engineer for failing to obey slow signal. He said he could, and any other railroad man with experience could, tell, when standing in front of an approaching train, whether it was coming too fast to board, and that a train coming 15 miles an hour could, in his judgment, be avoided after it approached within 15 feet. Funk was standing at about the proper place. "Witness would have gotten off the track, if he had been in his place. If he had slipped, that would have been a chance he would have taken."

The station master also testified that, "if a man has any eyes, he can tell when an engine is within 25 or 50 feet whether it is approaching too rapidly for him to attempt to board it."

The court instructed the jury, and no objections to instructions given are urged or insisted upon here.

The jury returned a verdict for the plaintiff for \$2,000, and defendant appealed.

W. E. Hemingway and *Lovick P. Miles*, for appellant.
Jeff Davis and *Frank Pace*, for appellee.

KIRBY, J. (after stating the facts as above). [1] It is strongly urged that the trial court should have directed a verdict for the defendant, and that the judgment is not sustained by the evidence. It is conceded that appellee was attempting to board the engine in the line of his duty; but insisted that, since there were two ways open for him to discharge this duty, one by standing on the track in front of the approaching engine and taking chances upon safely stepping upon an eight-inch toe plate upon the pilot of the locomotive, and the other by standing beside the track and mounting the gangway between the engine and tender, the latter being practically safe, and the other always fraught with more or less danger, that as a matter of law he was guilty of such contributory negligence as would preclude his recovery by attempting to board the train in the more dangerous way, when a safer way was open to his selection at his own option; but under the circumstances of this case that was a question for the jury under proper instructions, and not one of law to be determined by the court. *Railway v. Thompson*, 82 Ark. 11, 100 S. W. 83; *Railway v. Henrie*, 87 Ark. 443, 112 S. W. 967.

[2, 3] It was the duty of the engineer to slow up or reduce the speed of his engine upon the signal being given, as the uncontradicted testimony shows it to have been, and his failure to do so was negligence. The appellee had a right to rely upon the engineer slowing or reducing the speed of the engine after

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the slow signal was given, as was his duty and had been his custom, and when appellee discovered his failure to do so he was confronted with an emergency, because of such negligence, calling for the exercise of his judgment; and the jury found he was not guilty of contributory negligence in failing to discover that the engineer had not regarded the signal until the engine was so close as to frighten and confuse him, and make it necessary to decide whether it was safer to attempt to jump off the track or board the engine, nor in boarding it under the circumstances, and the testimony is sufficient to sustain their verdict. As already said, no objection to the giving or refusing of instructions is urged here.

The judgment is affirmed.

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(Supreme Court of Texas, April 19, 1911.)

[136 S. W. Rep. 435.]

Appeal and Error—Certified Questions—Questions of Fact.—The Supreme Court will not answer certified questions so far as they involve conclusions on facts stated.

Master and Servant—Railways—Unfit Employees—Evidence—Sufficiency.*—In an action against a railway company for assault by one employee upon another, evidence held to sustain a finding that the company was negligent in employing and retaining the employee committing the assault.

Evidence—Inferences—Failure to Produce Evidence.—Since the fact whether defendant investigated the fitness of one before employing him was peculiarly within defendant's knowledge, its failure to produce such evidence when, if any inquiry had been made, the proof was not only readily accessible, but of value to it, warranted a finding of no such inquiry.

Master and Servant—Railways—Employees—Efficiency—Duty of Company.*—A railway company must use ordinary care to inform itself of the character and efficiency of its employees.

Master and Servant—Unfitness of Employee—Notice to Employee.*—Proof of general bad reputation of an employee may charge his employer with notice of his unfitness, though the employer have no actual knowledge thereof.

*For the authorities in the series on the subject of the liability of a master for injury to a servant from the incompetency of another of his employees, see foot-note of *Johnson v. Lake Shore, etc., Ry. Co.* (Mich.), 37 R. R. R. 644, 60 Am. & Eng. R. Cas., N. S., 644.

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Master and Servant—Injury to Employees—Assault by Fellow Employees—Employer's Liability.†—An employer is liable for injury to an employee, resulting from negligence of a dangerous, drunken, and desperate employee, in doing the master's work; the latter's reputation being such that the employer was chargeable with notice of his character.

Master and Servant—Injury to Employee—Unfitness of Fellow Employee—Jury Question.*—Whether a railway company was negligent in employing and retaining one employee who assaulted another, held, under the evidence, a jury question.

Master and Servant—Railways—Vice Principals—Assistant Foremen.‡—Under Batts' Ann. Civ. St. art. 4560f, making railway employees having superintendence or control over other employees vice principals, an assistant foreman of a railway bridge gang was not a vice principal, where he merely led in the work under the foreman's direction.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by L. F. Day against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals to the Court of Civil Appeals, which court certifies questions. Questions answered.

Coke, Miller & Coke and *G. C. Groce*, for appellant.

A. D. Thompson, C. E. Mead, and Farrar, McRae & Kemble, for appellee.

RAMSEY, J. The certificate from the Court of Civil Appeals which presents the questions to which an answer is invited is quite lengthy, but cannot, in justice to the case, be condensed by us. It is as follows:

"Appellee sued the appellant, railway company, to recover damages for personal injuries inflicted upon him about the 6th of August, 1907, by one Jim Milam, a servant of appellant. Both Milam and Day were members of the bridge gang, and

†For the authorities in this series on the question whether a railroad company can be held liable for the willful, wanton, or malicious torts of its employees, see first foot-note of *Moore v. Atchison, etc., Ry. Co. (Okla.)*, 37 R. R. R. 776, 60 Am. & Eng. R. Cas., N. S., 776; first foot-note of *Baltimore, etc., R. Co. v. Strube (Md.)*, 37 R. R. R. 319, 60 Am. & Eng. R. Cas., N. S., 319.

*See foot-note on preceding page.

‡For the authorities in this series on the question whether a foreman or other superior was acting as a fellow servant or vice principal at the time an employee of the common master under his orders was injured through his negligence, see foot-note of *Cleveland, etc., Ry. Co. v. Foland (Ind.)*, 37 R. R. R. 637, 60 Am. & Eng. R. Cas., N. S., 637; last foot-note of *Delaware, etc., R. Co. v. Brown (C. C. A.)*, 36 R. R. R. 217, 59 Am. & Eng. R. Cas., N. S., 217.

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it was alleged that Milam was assistant foreman and in authority over Day. A recovery was sought upon the ground that the railway company was negligent in employing Milam and retaining him in its service. A trial resulted in a judgment against the railway company in favor of Day, and the case is now pending before us on appeal.

"It was shown by practically uncontroverted evidence that in August, 1907, appellee, the witnesses Harrison, Bush, Turner, Diffie, and Brown, with one Jim Milam and other parties, under the witness Irby as foreman, constituted a bridge and building gang in the services of appellant. Jim Milam and 'straw boss,' or 'scratch boss,' or assistant foreman. In the absence of the foreman, he had supervision over and directed the gang. The foreman when present controlled the gang, but Milam was expected to lead in the work, and the foreman would tell him what he wanted done, and he (Milam) would tell the men, and to this extent they were under him, even when the foreman Irby was present. Milam had no authority to employ or discharge hands. The only authority he had in that regard, even in the absence of Irby, was to report men who did not do to suit him, and Irby discharged or not as he saw fit. On August 6, 1907, the gang was at work, at Circleville, in Williamson county, in loading on the cars the material of a water tank that had been torn down. Irby, the foreman, was with the gang. While engaged in this work, Milam made an assault on Day with a knife, inflicting on him serious wounds.

"Concerning this assault and the circumstances attending it, the evidence is, in substance, as testified by appellee, viz.: 'At the time of this injury, I could not state positively just how much of this tank had been loaded, but we were attempting to load the hoops—that is, Mr. Irby gave an order to the boys to see if they could not get the hoops; but we found there was more material on them, and Jim Milam kept calling out to us to load the hoops: "By God, come on." Mr. Irby had given us another order, but Jim kept calling on us to load the hoops. The hoops held the tank together, but the other parts of the tank were wooden. * * * The best of my recollection is Milam said, "Come on, go to the cars," or "Come on." We were confused by the orders. Mr. Irby had told us to do one thing, and Mr. Milam was telling us to let them go. * * * We were hesitating on account of conflicting orders, and we were making different remarks. I just says, "we will have to get somebody to tell us what to do," and I looked up and saw him (Jim Milam) running through the crowd with a knife, and he says, "I have stood enough," "I have taken enough," or something like that. I did not know who he was after, but I knew in a few minutes; he ran upon me, cutting and slashing.'

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"There was evidence tending to show previous bad feeling between Milam and Day. Milam ran away immediately after the difficulty, and there was evidence tending to show that he afterward committed suicide.

"The evidence on the issue of negligence of the company in the employment and retention of Milam in its service, and as to Milam's character is, in substance, as testified by the witnesses as follows: Appellee testified: 'I became a member of Mr. Irby's bridge gang about the 1st of July, 1907, and continued to be a member of the gang until the 6th of August following. Mr. Milam was a member of the gang all that time, but he was hurt and out part of the time. Mr. Milam was quick-tempered and quarrelsome; unpleasant. This was not the case the whole time I was with him. Some time he would get quarrelsome, and some time he was a very pleasant man. At times he was tyrannical with the men employed under him. At times he was an unpleasant man. Milam drank intoxicants. He had been drunk. I had seen him drinking. When he would pass through a wet town, he would usually get a bottle of whisky, and I remember one time he ran the cook off; said the cook had stolen a bottle of whisky off of the ice. I did not see Milam what you would call drunk. The cook left the outfit. Our understanding was because he bawled him out about the whisky. I knew that Milam was a drinking man. Some of the time he was all right, and some of the time he was rough; he was rough, and some of the time he drank. Milam was unpleasant, and some of the time we might not be on the very best terms, but they had hauled me out of Ft. Worth, and I had to stay there. Some of the time we were not on the best of terms. I remember the night before the cutting he was sick, and I gave him some medicine. Of course, on bridge work some feelings come up between all men. At times things were not very pleasant between Milam and me, but nothing serious. While we were not the very best of friends, at the same time I had nothing against him. I cannot say that before Milam and I had disagreed any more than the others. I didn't admire Milam. I don't know how well I let him know that. When he started after me with his knife, he said something about he had taken enough; something like that.'

"J. R. Bush, witness for plaintiff, testified as follows: 'I had been working with the bridge crew at the time of the cutting continuously since the 10th or 12th of July, 1907. I do not know how long Jim Milam had been working for the Missouri, Kansas & Texas Railway Company of Texas, but he was working for them when I commenced on the date last above mentioned. I was with Jim Milam all the time during working hours from about July 10 to August 6, 1907, and had

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every opportunity to become well acquainted with Milam as is possible in that length of time. I knew Milam's habits as to whether or not he was sober or a drinking man. I knew his disposition as to whether he was a quiet and peaceable and well-disposed man, or whether or not he was high and quick-tempered. He was what is called a drinking man, and was not a quiet, peaceable, and well-disposed man. He had a high and quick temper when drinking and after being drunk. Jim Milam drank to excess whenever he could get whisky, and he usually kept whisky on hand. He drank whisky. He drank at all times, both on and off duty. Can't say he drank any more on Sundays than on other days, for he drank all that he could get at all times. There was a difference in his disposition towards the members of the crew when he was sober and when he was drinking, except after he had been drunk he was about the same as when he was drunk. When he was drinking, or just after a drinking spell, he was awful overbearing and hard to get along with. I knew the general reputation of Jim Milam among the members of the bridge crew for sobriety or the excessive use of intoxicants; his reputation was that of getting drunk and being addicted to the drinking habit to excess, and that he was not a sober man. I know his general reputation at said time among said persons as to being a peaceable and orderly person, and as to being quarrelsome, overbearing, and tyrannical in his disposition. He had the reputation of being a quarrelsome, overbearing, and tyrannical man and boss, and his reputation was that he was not a peaceable and orderly person. I know the general reputation of Milam at said time among said persons as to his being competent, safe, or suitable person to be placed in charge of, or to be associated with, other employees, or in charge of them in their work.'

"On cross-examination this witness testified: 'I had been a member of the gang since about July 10, 1907, and remained a member of same six or eight days after the difficulty. I quit the service at Temple, and have resided since said time about six miles southwest of Commerce, Hunt county, Tex., where I now reside. * * * I do not know of Jim Milam having a personal difficulty with any one except L. F. Day. He had various rackets, fusses, and quarrels, but this is the only fight I knew of his having. It is not a fact that Milam was or was usually considered to be an ordinary, peaceable, well-disposed and agreeable fellow. * * * He (Milam) was having some words with some member of the crew all the time. He talked in an overbearing and quarrelsome manner to some of them all the time, and by "some of them" I mean those to whom his remarks were directed at the time, for he talked to all of them in that manner; but it would be to some of them

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at a time. However, there was one member of the crew that I never heard him talk in that manner to but once, and that was Max Brown. On Saturday before the difficulty on Monday, he directed different members to go upon a scaffold, and each of them refused because it was not safe; he then directed Max to go upon it, and he refused, giving as his reason that it was not braced properly. Milam was intoxicated on duty so many times it is hard to give the dates or places, for it was so often that I got used to it, and did not take special notice of it. He was drunk on the Saturday before the difficulty at the time and place above mentioned. He was drunk on duty at Lorena about 10 or 12 days before the difficulty. He was drunk at Temple about a week prior to the difficulty. I can't say that he was drunk when he assaulted Day, but he had been drunk for the two days before. On the morning of the difficulty he had made several trips to the car, and when he would come back I could smell whisky on his breath. He was drunk Saturday and Sunday, and was drinking Monday morning at the time of the difficulty. I was a member of the same bridge crew with Jim Milam from July 10 to August 6, 1907. We worked on defendant's railroad between Waco and Elgin. I can't give the members of the bridge crew during the time. They were changing all the time, and I do not remember all of them—Joe Perkins, Frank Turner, Max Brown, ——— Costilla, and practically all other members of the crew, whose names I can't recall. I have discussed the reputation of Milam, of his crabbedness, and drunkenness, which brought on the discussion. All of above-named parties discussed the habits and disposition of Milam at many different times and places, one of which was at Granger about two weeks prior to the difficulty. It was common talk and discussed so often that I could say each member of the crew discussed his habits and disposition at every point the crew was during my service prior to the difficulty. I do not know of Milam having a difficulty with any other member of the bridge crew than Day, at the time of this difficulty, in which he engaged in a fight or inflicted any violence.'

"Harrison, Turner, Brown, and Diffie, witnesses for appellant, testified, in effect, that they had associated with Milam during the time he had been with the gang. That he would drink intoxicants, but never saw him intoxicated while on duty, and he seemed to be a sociable, nice, quiet fellow and friendly with everybody, and did not consider him of a quarrelsome and turbulent disposition; never knew of his having any difficulty with any one, except the one with Day.

"W. S. Irby, appellant, testified: 'I knew Jim Milam from the 17th of June to the 16th of August—6th of August, I mean. I never saw anything out of the ordinary in Jim Milam. To my

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knowledge during the time I knew him he had not been engaged in any personal difficulty with any one up to the time of this trouble with Mr. Day. If Mr. Milam ever drank, I didn't know it. Never to my knowledge was he intoxicated on duty. I never knew anything out of the ordinary about Milam's disposition. He was always pleasant and agreeable so far as I ever saw him. I knew there was an estrangement between them. I had a worthless negro cooking there; he was no account; I ran him off. I ain't clear on that.'

"On cross-examination the witness says: 'The company don't want drunk men; no, sir. They don't want men who are in the habit of getting drunk. They don't want men who are quarrelsome—broilers—and who cause trouble. If I hired that kind of men and the company found it out, they would likely call for an explanation. I never heard of Milam being drunk. I won't say I never heard of him drinking any. He may have taken a drink; I don't know. Some days before this my gang got some material some place to build some scaffolding. I don't recall just now where we do get the material. We may have got it at Temple. I could not tell you whether we were in Temple about the 1st of August or not, without my books here to look it up. I don't think Milam could have been drunk on duty and I not have known it. I don't recall anything about Milam being drunk at Temple. I won't say that he didn't get drunk; but I will say he never got drunk on duty around the outfit while he was working for me. I will say that much.'

"On redirect examination the witness testified: 'If Milam ever talked to members of the gang in an overbearing and quarrelsome way, I never heard it. If Milam was drunk on Saturday before this difficulty, I didn't know it. If Milam was drunk at Lorena 10 or 12 days before this difficulty, I didn't know it. He was not drunk at Temple a week prior to the difficulty that I know of. He was not drunk Saturday and Sunday before the difficulty that I know of. If he was drinking on the day of the difficulty, I didn't know it. The only authority Milam would have when I wasn't there was if the men didn't do to suit him was to tell me; report it to me. When I was absent, he could only have stopped the man from working and waited until I came, and then, if I had seen fit to have discharged him, I would have done so; otherwise I would not. If Milam had been drunk and raising any disturbance, I should have discharged him. If he had even been drunk on duty, I would have discharged him, without his raising any disturbance.'

"There was no evidence that appellant did or did not make an investigation of Milam's character and fitness before employing him.

"Question 1. Under the foregoing evidence, was the jury justified in finding that appellant was negligent in employing

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and retaining Milam in its service, and, if so, was the negligence such as to make appellant liable to Day for the injuries inflicted by Milam?

"Question 2. Was the position of Milam—that of 'straw boss,' as stated—such as to render the appellant liable for the act of Milam in injuring Day under the circumstances stated?

"The members of this court are divided in opinion on these issues, and think it proper to certify the foregoing questions for your honor's answers."

[1] 1. Both of these questions involve the decision of questions of fact and the sufficiency of the evidence to sustain a recovery. To the extent that they do involve conclusions on the facts stated we have deemed it no part of our office or duty to answer. We shall, however, undertake to answer both questions in so far as they involve questions of law and with such definiteness and fullness as should enable the Court of Civil Appeals to apply the law so declared to the facts stated.

[2] We think it cannot be doubted, under the authorities, that there was evidence tending to show, and which, if credited, would have justified the conclusion, that appellant was negligent in employing and in retaining Milam in its service, and that by such negligence appellee was subjected to the peril and danger of injury by him.

[3] It is stated by the Court of Civil Appeals that "there was no evidence that appellant did or did not make an investigation of Milam's character and fitness before employing him." Since this was a fact peculiarly within the knowledge of the railway company, its failure to produce such evidence when, if inquiry had been made, the proof was not only readily accessible, but of value to it, might well justify the jury in concluding that no such inquiry had been made.

[4] It is well settled in this state that it is the duty of a railway company to use ordinary and reasonable care to inform itself of the character and efficiency of its servants. *T. & P. Ry. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *Labatt on Master & Servant*, § 194. And, if not alone, certainly in connection with other proof, the failure to make such inquiry may well justify a finding of negligence.

[5] Again it is well settled that proof of general bad reputation may suffice to visit the master with notice of the unfitness of his servant, although there may, in fact, be no actual knowledge thereof proven. This rule is not only supported by the authorities, but is supported by reason and sound public policy. In the case last cited it is said, quoting from *McKinney on Fellow Servants*: "Evidence of general reputation is admissible to prove the unfitness of a fellow servant, and ignorance of such general reputation on the part of the master is itself negligence, in a case in which proper inquiry would have obtained the

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necessary information and where the duty to inquire was plainly imperative." Under the testimony of Rush, Milam's bad reputation existed among his associates for the whole period of his employment, and, while this time was short and the circle of his acquaintance limited, we think, in view of all the facts, and especially the extent to which Irby, the foreman, was thrown with all these men, that it was sufficient to raise the issue of unfitness.

It is said by Labatt, in his valuable work on Master & Servant, vol. 1, p. 432: "Under either of these doctrines, evidence of reputation is only admitted when the injury in suit was due to the particular kind of unfitness for which the servant was notorious, and when the unfitness is of such a kind that it may become the subject of a general reputation." It has been held, however, that reputation for intemperance comes within the rule of general reputation.

In the well-considered case of *Norfolk & Western R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710; 47 Am. St. Rep. 342, the Maryland Court of Appeals said:

"It has been repeatedly held by this court, and is the settled and established doctrine of Maryland, that in actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow servant, the plaintiff to succeed must prove not only that some negligence of the fellow servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow servant in the first instance, or in retaining him in his service afterwards. Mere negligence on the part of a fellow servant, though resulting in injury, will not suffice to support the action, because the master does not insure one employee against the carelessness of another; but he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employee, not for the mere negligent act or omission of the incompetent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant. As this negligence of the master must be proved, it may be proved like any other fact, either by direct evidence or by the proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred. That drunkenness on the part of a railroad employee renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not

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only to the public, but to every employee in his service. There is no evidence in the record, nor has there been a suggestion, that either the conductor, fireman, or flagman of the train was negligent or incompetent. The negligence which directly caused the accident is attributed solely to the brakeman; and the appellant's negligence, which, as it is claimed, fixes its liability, lies in its employment of, or continuing to retain in its service, these dissipated or intemperate brakemen. But, as we have stated, it was necessary for the plaintiff to show, not only their employment, but that the company had not used due and ordinary care in selecting them. There was no direct evidence adduced to show the absence of such care; but the question excepted to, and the evidence elicited in response to it, was designed to show by indirect or circumstantial evidence that the company had not used the degree of care and caution in the selection of these brakemen that its duty imperatively required it to use. So the question is, Can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant? About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his (the master's) negligence in not informing himself: if he could have been ignorant of it only because he failed to make investigation—then it is obvious that he had not used the care and caution which the law demands of him in selecting his employees. Hence 'the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown.' Wood, *Master & Serv.* § 420.

"In *Davis v. Detroit & M. R. Co.*, 20 Mich. 112, 4 Am. Rep. 364, Cooley, J., speaking for the court, adopts the same of *Gilman v. Eastern R. Co.*, 13 Allen [Mass.] 433, 90 Am. Dec. 210, which puts upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. Continuing he said: 'The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative.' So in *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437, 21 N. W. 878, where a track hand was killed by an engine backing rapidly along a switch, and the engineman was drunk, the court said: 'When, however, as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condi-

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tion, and when it is shown, further, that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in the defendant's employ, and no actual knowledge or notice ever reached any superior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and in retaining the engineer in its employment.' See, also, *Gilman v. Eastern R. Co.*, 13 Allen [Mass.] 433, 90 Am. Dec. 210; *Wright v. New York Cent. R. Co.*, 25 N. Y. 566; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Chapman v. Erie R. Co.*, 55 N. Y. 579. The evidence offered and admitted had no relation to specific or isolated acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care. *Baltimore Elevator Co. v. Neal*, 65 Md. 438 [5 Atl. 338]."

[6] And we think there could be no difference whether the injury result from negligence in doing the master's work, or from an assault made by a dangerous, drunken, and desperate employee, if his reputation was such that the master might reasonably have foreseen such consequences.

Again, it has sometimes been held that the act causing the injury may itself be of such character as to warrant the jury in finding that the master had retained the servant with knowledge of his incompetency. Mr. Labatt says (volume 1, p. 429): "It seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness, if proper inquiries had been instituted when he was hired, or his work had been properly supervised." This rule, it must be evident, must ordinarily have relation to those acts of unskillfulness and obvious incapacity which would develop in the course of the servant's labor in carrying on the master's business. But we think by analogy that in the fact of an assault, both so desperate and so unprovoked, that the jury might find some support of the charge of the unfitness of Milam, and of appellant's negligence in not discovering it. In what we have said we have not undertaken to determine the weight and probative force of the testimony.

[7] We merely hold that on the issue made, covered by the first question submitted, there was sufficient evidence to carry the case to the jury.

[8] 2. To the second question we answer that the position of Milam was not, as applied to the facts of this case, such as to render the appellant liable for his acts on the theory that he was a vice principal.

Article 4560f of Batts' Civil Statutes is as follows: "All persons engaged in the service of any person, receiver or corpora-

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tion, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees."

To correctly apply this statute, we must keep in mind the facts of the case. The certificate states: "Jim Milam was 'straw boss,' or 'scratch boss,' or assistant foreman. In the absence of the foreman, he had supervision over and directed the gang. The foreman, when present, controlled the gang, but Milam was expected to lead in the work, and the foreman would tell him what he wanted done, and he (Milam) would tell the men, and to this extent they were under him, even when the foreman, Irby, was present. Milam had no authority to employ or discharge hands." It appears from the testimony that Irby, the foreman, was present, in active and actual control of the men and the work, when appellee was hurt. A question quite similar to this, under a statute substantially identical with the article above quoted, was before this court in the case of *Texas Central Ry. Co. v. Frazier*, 90 Tex. 33, 36 S. W. 432. In that case it was in evidence that it was the duty of the engineer to give signals which, when so given, were to be obeyed by brakemen. Since Frazier, a brakeman, occupied this relation to the engineer, it was contended that this was such superintendence, control, and command of the engineer over Frazier as made him, under the then existing law, a vice principal. This position and contention was, however, squarely denied by this court. In discussing the question Judge Denman said:

"The purpose of the statute was to impute to the master the negligence of an employee upon whom he has conferred authority or power to influence the action or volition of another employee in the performance of his duties. Under the common-law rule, as settled in this state before the statute, the negligence of an employee would not have been imputed to the master, unless he had the power to employ and discharge: it being assumed that such power was necessary to subject the will of the latter to that of the former.

"The statute, however, is based upon the theory that the authority or power in one employee to superintend, control, or command, or direct another employee in the performance of his duties as effectually influences and subjects to the former the will of the latter as does the power to employ and discharge. But it was not the purpose of the statute to impute to the master the negligence of an employee upon whom he had conferred

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no such power, but had merely imposed the duty, in certain contingencies arising in the course of his employment, of giving a signal whereby another employee would know that the occasion had arisen for him to perform some duty imposed upon him by the rules governing his employment, leaving such employee free to perform such duty in his own way under such rules. In such a case there is no subjection of the will of one to that of the other."

The rule there laid down and the principle therein announced seems conclusive of this case.

FLETCHER v. FREEMAN-SMITH LUMBER CO.

(Supreme Court of Arkansas, March 13, 1911.)

[135 S. E. Rep. 827.]

Master and Servant—Railroad Brakeman—Injuries to Employee—Instructions.—In an action for injuries to a brakeman while coupling cars, an instruction that if there were two ways in which he could have made the coupling, one to stand on the outside and signal the engineer to stop or slow down, and that was the safer way, and that the other and more dangerous way was to make the coupling while the cars were moving, and he chose the latter way, he could not recover, was erroneous, as making him the insurer of his own safety.

Master and Servant—Railroad Brakeman—Injuries—Jury Question—Contributory Negligence.*—Whether a brakeman was guilty of contributory negligence in attempting to couple moving cars held, under the evidence, a jury question.

Appeal and Error—Harmless Error—Exclusion of Evidence.—In an action for injury to a brakeman while coupling cars, it was not prejudicial error to exclude evidence of the defective condition of locomotive where that was not the cause of the injury.

Master and Servant—Railroad Brakeman—Injury—Jury Question—Negligence.—In an action for injury to a brakeman while coupling cars, held, under the evidence, a jury question whether the engineer was negligent in failing to discover the brakeman's signal and stop the engine after the latter was imperiled.

*For the authorities in this series on the subject of contributory negligence in coupling or uncoupling cars, see last foot-note of *York v. St. Louis, etc., Ry. Co.* (Ark.), 30 R. R. R. 466, 53 Am. & Eng. R. Cas., N. S., 466; first head-note of *Day v. Louisiana W. R. Co.* (La.), 29 R. R. R. 111, 52 Am. & Eng. R. Cas., N. S., 111.

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Master and Servant—Railways—Statutory Provisions—Applicability.†—The statutory duty to keep a lookout on railroad trains does not extend to coemployees operating a train.

Master and Servant—Railroad Employees—Injury—Negligence—Presumption.‡—As between coemployees operating the same train, there is no presumption of negligence as affecting the company's liability for injury to one of them.

Master and Servant—Railroad Employees—Assumption of Risk.§—A railroad workman assumes the risk of injury resulting from the maintenance of a track on a steep grade.

Appeal from Circuit Court, Calhoun County; Geo. W. Hays, Judge.

Action by Tandie Fletcher against the Freeman-Smith Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. S. McKnight and Carmichael, Brooks & Powers, for appellant.

Gaughan & Sifford, for appellee.

MCCULLOCH, C. J. The plaintiff was employed by defendant to assist in the operation of a log train by which defendant's logs were transported. He was a brakeman, and it was a part of his duties to couple cars. While performing that particular

†For the authorities in this series on the subject of the duties and liabilities of railroad companies, as employees, for injuries to employees, other than those engaged at the time of the accident in coupling and uncoupling cars, sustained while they are on railroad tracks, and caused by the operation of trains, engines, or street cars, see foot-note of *Wickham v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 597, 56 Am. & Eng. R. Cas., N. S., 597, where all those preceding it are collected; sixth head-note of *Young v. St. Louis, etc., Ry. Co.* (Mo.), 36 R. R. R. 197, 59 Am. & Eng. R. Cas., N. S., 197.

‡For the authorities in this series on the subject of presumption of negligence and plaintiff's burden of proof in action against master for the death of or injury to his servant, see last foot-note of *Duvall v. Seaboard A. L. Ry. (N. Car.)*, 36 R. R. R. 532, 59 Am. & Eng. R. Cas., N. S., 532; second head-note of *Missouri, etc., Ry. Co. v. Foreman* (C. C. A.), 36 R. R. R. 491, 59 Am. & Eng. R. Cas., N. S., 491; third head-note of *Pittsburgh Rys. Co. v. Thomas* (C. C. A.), 36 R. R. R. 36, 59 Am. & Eng. R. Cas., N. S., 36; second head-note of *Missouri, etc., Ry. Co. v. Williams* (Tex.), 35 R. R. R. 770, 58 Am. & Eng. R. Cas., N. S., 770; foot-note of *Missouri, etc., Ry. Co. v. Jones* (Tex.), 35 R. R. R. 346, 58 Am. & Eng. R. Cas., N. S., 346; third head-note of *Siegel v. Detroit, etc., Ry. Co.* (Mich.), 35 R. R. R. 311, 58 Am. & Eng. R. Cas., N. S., 311.

§For the authorities in this series on the question whether trainmen assume the risk from defective tracks, roadbeds, bridges, etc., see second foot-note of *Long Pole Lumber Co. v. Cross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; second head-note of *Smith v. Chicago, etc., Ry. Co.* (Kan.), 36 R. R. R. 640, 59 Am. & Eng. R. Cas., N. S., 640.

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service, he received personal injuries, alleged to have been caused by negligence of other employees of defendant, and he sues to recover damages.

The injury occurred on a spur track in the woods near a log camp. The engine was backing in on the spur to take out some log cars. Plaintiff was on the engine, and when it got within about 25 yards of the car to be coupled he got down from the engine and ran ahead to make the coupling. He testified that when he reached the car the engine was about eight feet distant, coming at the rate of about six miles per hour; that he went in between the engine and the car and raised the pin preparatory to making the coupling, but discovered that the car was too high for the reach of the engine; that he did not have time to change the reach or to get out, and he signaled the engineer to stop, but that the engineer failed to stop and ran the engine against him, mashing him between the tender and the ends of the logs on the car. He testified further that if the engineer had been in his proper place on the engine he could have seen the signal in time to stop.

It is alleged in the complaint that the brake of the engine was so defective that when backing down a steep grade it would not hold, and that the injury was caused either on account of the negligence of defendant in allowing the engine to get out of repair in that particular, or on account of the negligence of the engineer in failing to stop the engine. It is also alleged in the complaint that defendant was guilty of negligence in building the spur on the side of a hill where the grade was so steep.

The defendant in its answer denied the charges of negligence, and pleaded contributory negligence of plaintiff. The trial before a jury resulted in a verdict in defendant's favor, and the plaintiff appealed.

The court gave the following instruction over plaintiff's objection: "(4) The jury are instructed that if you believe from the evidence that the engineer backed the engine down to the coupling under control, and that there were two ways in which the plaintiff could have acted in making the coupling, one to stand on the outside and signal the engineer to stop or slow down, and that this was the safer way, and that the other way was to go in and attempt to make the coupling between the cars without having first from the outside done such signaling, and that the latter was the more dangerous way, and that plaintiff chose the latter way, then your verdict must be for the defendant." This instruction was erroneous and should not have been given. It made the plaintiff the insurer of his own safety. The jury should have been allowed to say whether or not it constituted negligence for plaintiff to attempt to make the coupling in the way he did. C., O. & G. Ry. Co. v. Thomp-

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son, 82 Ark. 11, 100 S. W. 83; *K. C. S. Ry. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967; *Headrick v. H. D. Williams Cooperage Co.*, 134 S. W. 957.

Error of the court is assigned in excluding the testimony of witness Farnsworth as to the alleged defect in the brake of the engine. We need not discuss that assignment, for the reason that the exclusion of the testimony on that point was not prejudicial. There was no testimony tending to show that the engineer saw the signal, or that he attempted to stop the engine. On the contrary, the evidence is undisputed that the engineer did not see the signal, if plaintiff gave one. The defective condition of the engine was not the cause of the injury.

Plaintiff was, however, entitled to go to the jury on correct instructions submitting the question of alleged negligence on the part of the engineer in failing to discover plaintiff's signal and stop the engine after the latter's position became perilous. The lookout statute is not applicable to coemployees engaged in the operation of a train, and the court correctly instructed the jury as to the duty of the engineer, and there can be no just complaint of the court's ruling in that respect. The court gave an instruction to the effect that there is no presumption of negligence on the part of defendant's servants, and that it devolved on the plaintiff to prove the alleged acts of negligence. This was correct. As between coemployees operating the same train there is no presumption of negligence. *Fordyce v. Key*, 74 Ark. 19, 84 S. W. 797; *St. L., I. M. & S. Ry. Co. v. Hill*, 79 Ark. 76, 94 S. W. 914; *Chicago, M. & L. Co. v. Cooper*, 90 Ark. 326, 119 S. W. 672.

It was not error to modify the fourth instruction requested by plaintiff as to assumption of risk of danger by reason of alleged negligence in building the track on the steep grade. The spur track where plaintiff received injury was his accustomed place of work, and the grade was open to his observation when he took service. He assumed the risk of all danger from that source. *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *C. O. & G. Ry. Co. v. Thompson*, *supra*; *York v. St. L., I. M. & So. Ry. Co.*, 86 Ark. 244, 110 S. W. 803; *Arkansas Midland R. Co. v. Worden*, 90 Ark. 407, 119 S. W. 828.

For the error in giving the aforementioned instruction on the subject of contributory negligence, the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

LAWRENCE v. KAUL LUMBER CO.

(Supreme Court of Alabama, April 13, 1911.)

[55 So. Rep. 111.]

Appeal and Error—Review—Harmless Error—Rulings Relating to Pleading.—Where the evidence shows without dispute that plaintiff could not have recovered on certain counts of the complaint, any error in sustaining demurrers thereto is harmless.

Appeal and Error—Review—Error Waived in Appellate Court.—Assignments of error, not argued, are waived.

Carriers—Transportation of Passengers—Who Are Passengers.*—To constitute one a passenger, it is not necessary that the carrier should be a common carrier, nor that the train or car should be used or adapted primarily for carrying passengers, and one may be a passenger, though he pay nothing for his carriage; the only essential being that he is accepted as a passenger for transportation by the carrier.

Carriers—Injury to Passenger—Care Required.†—When a passenger chooses to be transported on a train, not adapted to passenger service, such as a freight or a logging train, while he does not waive the carrier's duty of due care with respect to his safety, he does waive all precaution, whether in equipment or operation, which are inconsistent with the ordinary use and conduct of such a train, and assumes the risk of injury from accident incident to such train when equipped and operated in the usual way.

Carriers—Carriage of Passengers—Who Are Passengers.*—Where a carrier is not a common carrier of passengers, and has not expressly contracted to carry in the particular case, if the presence of a person entering on its train and taking passage is without the knowledge and consent of any one in charge of the train, he is but a trespasser; if on invitation, or with the knowledge and acquies-

*For the authorities in this series on the question who are, and are not, passengers, see first foot-note of *Columbus Ry. Co. v. Asbell* (Ga.), 38 R. R. R. 22, 61 Am. & Eng. R. Cas., N. S., 22; tenth head-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; first head-note of *McDade v. Norfolk, etc., Ry. Co.* (W. Va.), 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; first foot-note of *Louisville R. Co. v. Mitchell* (Ky.), 36 R. R. R. 710, 59 Am. & Eng. R. Cas., N. S., 710; last foot-note of *Layne v. Chesapeake & O. R. Co.* (W. Va.), 36 R. R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537.

†For the authorities in this series on the subject of the existence of the relation of carrier and passenger as affected by failure to purchase ticket or pay fare, see last paragraph of foot-note of *Thompson v. Nashville, etc., Ry.* (Ala.), 34 R. R. R. 171, 57 Am. & Eng. R. Cas., N. S., 171; second head-note of *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 32 R. R. R. 463, 55 Am. & Eng. R. Cas., N. S., 463.

†See last foot-note of *Usury v. Watkins* (N. C.), 36 R. R. R. 136, 59 Am. & Eng. R. Cas., N. S., 136.

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cence of an agent, not authorized nor shared in by his principal, he is a licensee; but if on the invitation, express or implied, of the carrier, its manager, or any authorized agent, he is a passenger.

Carriers—Carriage of Passengers—Care Required.†—A carrier which is not a common carrier of passengers is liable to a passenger for injury proximately caused by its simple negligence; but for injuries to a licensee or trespasser it is liable only for wanton negligence, or willful wrong, including its failure to exercise due care to avert injury after the danger is apparent.

Carriers—Injury to Passenger—Pleading.—Where a complaint for causing the death of a passenger does not charge that the defendant was a common carrier, but only that it operated a train on a railway, and that decedent was being carried by defendant as a passenger, pleas alleging that the deceased voluntarily, without invitation, and without compensation to the defendant, boarded the car on which he was riding show a complete defense to counts of the complaint, based on simple negligence.

Carriers—Injury to Passenger—Pleading—"Invitation."—In pleas alleging that decedent, without invitation from defendant, boarded the car on which he was riding, the word "invitation" is a term of considerable breadth, including not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its alter ego.

Evidence—Expert Testimony—Competency of Witness.—Where a witness testified that after a derailment he at once examined the railroad track at the point where it occurred, finding a muddy place where two or three ties had sunk in the mud, so as to be entirely covered, making the outer rail of the curve lower than the inner rail, and that he had been working for defendant, a lumber company, which owned the track, for more than five years, he was not competent to testify as an expert as to what caused the car to turn over, in the absence of any further showing as to knowledge or experience that might have qualified him to give the testimony.

Evidence—Expert Testimony—Competency of Witness.—Proof that a witness who examined the track immediately after derailment of a train had had several years' experience in working as a section hand on railroads was insufficient to qualify him as an expert to testify as to the cause of the derailment.

Evidence—Opinion Evidence—Matters Directly in Issue.—If a witness were not an expert, and no expert knowledge was required for an opinion as to the cause of a derailment, his opinion could be of no service to the jury, where they were in possession of all the facts on which his conclusion rested.

†For the authorities in this series on the subject of the care due licensees or trespassers on trains or street cars, see last paragraph of second foot-note of *Welch v. Boston* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35.

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Evidence—Conclusion—Knowledge of Other Person.—Though decedent's knowledge of the dangerous condition of defendant's road, resulting in the derailment which caused his death, was relevant, testimony that he did or did not know of it was not admissible.

Appeal and Error—Assignments of Error—Necessity.—Charges set out in the record on appeal, but not presented for review by any assignment of error, cannot be considered.

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by J. P. Lawrence, as administrator against the Kaul Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Whitson & Harrison, for appellant.

A. G. & E. D. Smith, Felix L. Smith, and Riddle & Allen, for appellee.

SOMERVILLE, J. While riding on a train of cars operated by the defendant, in April, 1905, plaintiff's intestate was killed by reason of the derailment of the car in which he was sitting; the car after leaving the rails being overturned, and crushing the deceased underneath its weight.

Defendant was not a common carrier of either freight or passengers, and operated no passenger trains. It built and operated a short line of railroad from its logging camp and commissary at Woodbine to the Central of Georgia Railroad at Overbrook, from which point to Sylacauga it used the C. of G. track. Its road was designed for its own use in its logging and lumber business; but a custom had arisen of allowing its hands and employees to ride to and fro on its freight trains for their own convenience, which was in time extended apparently to all persons who sought the privilege.

The deceased was employed or hired by defendant to cut ties on its lands at so much a tie, and at his discretion. Otherwise he had no relations with the defendant or its business. On the occasion of his death, he and a number of others had ridden up to Sylacauga, and were returning to Woodbine. The derailment occurred on defendant's own track, and the train, consisting of an engine and a single box car pushed in front of it, was moving at a speed of three or four miles an hour. The grade of the road at this point had been constructed about a year before, and the track laid within four months. The grade had not been surfaced up, and a force of hands were then engaged in that work. The evidence is in conflict as to the condition of the track at or near the point of derailment. The plaintiff's evidence tends to show that at or very near such point, which was on a curve, the outer rail sagged for a space of four or five ties, and was thereby made lower than

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the inner rail; while defendant's evidence tended to show that the sagged space was for only one or two ties, and the outer rail was level with the inner rail.

The complaint is in 17 counts, and to each count numerous grounds of demurrer were interposed. These were sustained as to counts 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, leaving for issue counts 1, 2, 13, 14, and 17. All of these counts predicate the right of recovery on the defendant's breach of duty to deceased while being carried as a passenger on its train and counts 2, 13, and 14 are for wanton or intentional wrong.

To these counts defendant pleaded the general issue, and special pleas 3, 4, and 5, which, in substance, assert deceased's knowledge of the unsafe condition of the track for passengers, and that so knowing he voluntarily boarded the car and exposed himself to the danger, without invitation from or compensation to the defendant. Plaintiff's demurrers to pleas 3 and 4 were overruled, and to plea 5 sustained. These various rulings on demurrers to complaint and pleas, with several rulings on testimony offered by plaintiff, make up the 45 assignments of error.

[1] 1. If counts 3 to 12, inclusive, had not been eliminated by demurrer, plaintiff could not possibly have recovered under any of them, since the evidence shows without dispute, and plaintiff's counsel in argument assert, that there was no relationship of master and servant between deceased and the defendant. We are therefore unwilling to consider the theoretical merit of the first 10 assignments of error, because the errors, if any, were entirely harmless.

[2] The 11th and 12th assignments, relating to counts 15 and 16, are not argued, and must be treated as waived.

[3] 2. To constitute one a "passenger" who is riding on a train, it is well settled that it is not necessary that the carrier should be a common carrier, nor that the train or car should be used or adapted primarily for carrying passengers. *Birmingham R., L. & P. Co. v. Adams*, 146 Ala. 267, 272, 40 South. 385, 119 Am. St. Rep. 27. It is also well settled that the person transported is none the less a passenger, because he pays nothing for his carriage, or because he rides for his own convenience solely, by the courtesy of, and absolutely without profit to, the carrier. 5 A. & E. Ency. Law, 507; 1 Am. & Eng. Ann. Cas. 451, note; *Indiana Traction Co. v. Klentschy*, 167 Ind. 598, 79 N. E. 908, 10 Am. & Eng. Ann. Cas. 869; *Harvey v. Deep River Logging Co.* (1907) 49 Or. 583, 90 Pac. 501, 12 L. R. A. (N. S.) 131. The essential requirement seems to be only that the passenger is accepted as such—that is, for transportation by the carrier; the trust and confidence thereby induced, on considerations of public policy, imposing upon the carrier the duty to reasonably safeguard, and not negligently

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injure, the person so carried. In some of its applications, this rule is undoubtedly a harsh one, and the results sometimes seem scarcely consistent with reason and justice.

[4] When, however, the passenger chooses to be transported on a train, not adapted to passenger service, such as a freight or a logging train, while he does not waive the carrier's duty of due care with respect to his safety, he does waive all such precautions, whether in equipment or operation, which are inconsistent with the ordinary use and conduct of such a train, and cannot expect the carrier to change or adapt his service to the extraordinary requirements of a common carrier of passengers. In other words, he assumes the risk of injury from such accidents as are incident to such trains when equipped and operated in the usual way. *Southern Ry. Co. v. Crowder*, 130 Ala. 256, 263, 30 South. 592; *Harvey v. Deep River Logging Co.*, 49 Or. 583, 90 Pac. 501, 12 L. R. A. (N. S.) 131.

[5] 3. But, if the carrier is not a common carrier of passengers, and has not expressly contracted to carry in the particular case, a person entering upon its train and taking passage thereon might be, under various circumstances, either passenger, a licensee, or a trespasser. If his presence is without the knowledge and consent of any one in charge of the train, he is but a trespasser. If on the invitation, or with the knowledge and acquiescence, of such an agent, not authorized nor shared in by his principal—the carrier itself, or its alter ego—such person would be but a licensee. *McCauley v. Tenn. Co.*, 93 Ala. 360, 9 South. 611; *Files v. Boston, etc., R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411. If on the invitation, express or implied, of the carrier or its alter ego manager, or of any authorized agent, such person would be a passenger. *Id.*; *Harvey v. Deep River Logging Co.* (1907) 49 Or. 583, 90 Pac. 501, 12 L. R. A. (N. S.), 131.

[6] In the last instance he could recover of the carrier for injuries suffered while a passenger, and proximately caused by the simple negligence of the carrier; while in either of the other instances he could recover under a proper complaint only for the wanton negligence or willful wrong of the carrier, including its failure to exercise due care to avert injury after the danger was apparent. *McCauley v. Tenn. Co.*, 93 Ala. 356, 9 South. 611.

[7] The complaint does not charge that the defendant was a common carrier, but only that it operated a train on a railway, and that the deceased was being carried by the defendant as its passenger. Pleas 3 and 4 are substantially alike; but plea 3 is, by formal averment, a plea of contributory negligence, while plea 4 is one of assumption of risk. Each plea charges that the deceased "voluntarily, of his own free will and accord, without invitation from the defendant, and without any com-

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pensation to the defendant, boarded the car on which he was riding," and which by turning over on him produced his death.

Without regard to the sufficiency of the averments of the pleas to show that deceased had knowledge of the dangerous condition of the track over which he was riding, such as to import contributory negligence or assumption of risk in so riding, we are of the opinion that, if the quoted averments were true, they would constitute prima facie a complete defense to every count of the complaint based on simple negligence, and to such only are they pleaded. This is necessarily so, because one who enters and takes passage on the train of a carrier, not shown to be a common carrier, without actually paying therefor, and without any invitation from the carrier to do so, is at best but a licensee, and not a passenger, and would in law assume every risk of injury not due to the wanton negligence or willful wrong of the carrier or its servants. If the complaint showed the defendant to be a common carrier, the want of an invitation would be obviously immaterial, and the plea would be insufficient as an answer to the liability charged.

[8] It is to be noted that "invitation," in the sense in which it is here used in these pleas, and as commonly used and defined by law writers in this connection, is a term of considerable breadth, and includes, not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its alter ego. *A. G. S. Ry. Co. v. Godfrey*, 156 Ala. 202, 218, 47 South. 185, 130 Am. St. Rep. 76; *Brown v. Scarboro*, 97 Ala. 316, 322, 323, 12 South. 289. Upon this question of implied invitation, based on the known custom or usage of the defendant or its agents, much pertinent testimony was introduced on the trial, and this issue as made by the pleadings was one of fact for the jury to determine.

[9] 4. Plaintiff's witness, Boss Lennard, had testified that he was on the train at the time of the accident, and at once examined the track at the point of derailment, finding a muddy place where two or three ties had sunk in the mud so as to be entirely covered, making the outer rail of the curve lower than the inner rail. The witness stated that "he had been working for defendant for more than five years last past." Plaintiff asked the witness, "What caused that car to turn over?" Defendant objected on the ground that the answer would be irrelevant and immaterial, and but the conclusion of the witness, which objection was sustained by the court. The answer sought was plainly the witness' conclusion as to a matter that involved expert knowledge at least of railroad tracks, if not of running trains. The witness showed no knowledge or experience that might have qualified him to answer such a ques-

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tion, since, for all that appears, his service with the defendant lumber company may have been restricted to chopping timber in the woods. The question was properly disallowed.

[10] 5. A part of the testimony of plaintiff's witness Chandler (presented by written showing) to the effect that the car was caused to turn over because of the lower outside rail, and because of the sagged place under the rail, was excluded on defendant's motion, on the ground that it was immaterial, irrelevant, and a conclusion of the witness. This witness was also present on the train when the accident occurred, and carefully examined the track; his testimony as to its condition being substantially the same as that of the witness Lennard. He stated that he was then in the service of defendant, and that he had had "several years" experience in working as a section hand on railroads."

[11] While judicial knowledge may inform us of the general nature of the work and experience of a railroad section hand, we certainly cannot discover in such a service any satisfactory assurance of expert knowledge of railroad tracks or their sufficiency for the accommodation of rolling stock, or ability to say that the condition of this track absolutely caused the overturning of this car while running at the rate of three or four miles an hour. And, if the witness was not an expert, and no expert knowledge was required for such a conclusion, manifestly his opinion could be of no service to the jury, since they were in possession of all the facts upon which his conclusion rested, and were equally capable of drawing a correct conclusion for themselves. 1 Greenl. on Ev. (16th Ed.) 549. The trial court did not err in excluding this testimony, and also the statements of the witness to the effect that the road at this point was not properly constructed.

[12] 6. Whether or not the deceased knew of the dangerous condition of defendant's road was, of course, a relevant inquiry under the pleadings; but the witness could not testify that deceased did or did not know of it—a rule of evidence many times declared by this court. *Bailey v. State*, 107 Ala. 151, 18 South. 234; *W. P. Coal Co. v. Andrews*, 150 Ala. 368, 43 South. 348; *Layton v. Campbell*, 155 Ala. 220, 46 South. 775, 130 Am. St. Rep. 17. The statement was properly excluded.

[13] 7. The giving of the several charges set out in the record is not presented for review by any assignment of error, and we are therefore unable to consider any of them.

The record disclosing no error prejudicial to appellant, the judgment of the circuit court must be affirmed.

Affirmed.

SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

LOUISVILLE RY. CO. *v.* WILDER.

(Court of Appeals of Kentucky, May 2, 1911.)

[136 S. W. Rep. 892.]

Trial—Carriage of Passengers—Personal Injuries—Instructions—Evidence to Support.—In an action against a street railway company for injuries received by a passenger while entering the car, an instruction that the jury was authorized to find a verdict for plaintiff if they believed from the evidence that the car was started with a reckless or unusual jerk is improper, in the absence of evidence of such a jerk.

Carriers—Carriage of Passengers—Personal Injuries—Taking up Passengers—Duty.*—A carrier is liable for injuries from a fall received by a woman who with a baby in her arms boarded a street car, which, before she reached a seat, started, only if she required more than ordinary care, and if that fact could, by the exercise of the highest degree of care, have been discovered, and if, notwithstanding her condition and its knowledge, the carrier failed to allow her reasonable opportunity to take a seat before starting the car, and hence an instruction in substance telling the jury that, if her situation imposed upon the carrier the duty of exercising more than usual care, then she was entitled to recover, if the car was started before she was seated, was erroneous, placing too great a burden on the carrier.

Carriers—Carriage of Passengers—Personal Injuries—Taking up Passengers—Duty.†—A passenger injured by the starting of a street car cannot recover unless the car was started in a violent, unusual, or reckless manner.

Carriers—Carriage of Passengers—Personal Injuries.‡—It is the duty of persons in charge of street cars to at all times exercise toward every passenger the highest degree of care, which care may vary in its application to different persons, the strong and active not needing the same care to save them from injury as do children

*For the authorities in this series on the subject of the degree of care required of a street railway as a carrier of passengers, see first foot-note of *Doherty v. Boston, etc., St. Ry. Co. (Mass.)*, 38 R. R. R. 390, 61 Am. & Eng. R. Cas., N. S., 390; *Trussell v. Norris County Traction Co. (N. J.)*, 37 R. R. R. 773, 60 Am. & Eng. R. Cas., N. S., 773.

†For the authorities in this series on the subject of the liability of carriers for injuries to passengers from jerks or jolts of trains or street cars, see first foot-note of *St. Louis, etc., Ry. Co. v. Holmes (Ark.)*, 38 R. R. R. 400, 61 Am. & Eng. R. Cas., N. S., 400; foot-note of *St. Louis, etc., R. Co. v. Cox (Okla.)*, 37 R. R. R. 565, 60 Am. & Eng. R. Cas., N. S., 565.

‡For the authorities in this series on the duties and liabilities of a carrier as affected by the sickness, infirmity or helpless condition of a passenger, see second foot-note of *Central of Georgia Ry. Co. v. Madden (Ga.)*, 38 R. R. R. 516, 61 Am. & Eng. R. Cas., N. S., 516.

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or persons under disabilities, and with the latter class it is the duty of those in charge to exercise the highest degree of care to discover persons laboring under disabilities and to exercise toward such the degree of care his situation and condition demands.

Carriers—Carriage of Passengers—Personal Injuries—Jury Question.—Whether or not a woman entering a street car with a baby in her arms should be given an opportunity to be seated before the car is started is a question for the jury.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Ada Wilder against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Alfred Selligman, Fairleigh Straus & Fairleigh, and Howard B. Lee, for appellant.

O'Doherty & Younts, for appellee.

CARROLL, J. This appeal is prosecuted from a judgment in favor of the appellee, and a reversal is asked upon the ground that the evidence offered in her behalf did not support the averments of the petition, and for alleged error giving and refusing instructions.

The petition as amended averred that, while one of appellant's cars was standing motionless for the purpose of permitting passengers to get on, appellee, who was carrying an infant child in her arms, got on the platform of the car for the purpose of going in the car and taking a seat, and before she was safely in the car it was by the negligence of the persons in charge of the car started with a "reckless or unnecessary and unusual jerk or lurch," causing her to be thrown against the side of the doorway and seats of the car, bruising and injuring her severely.

Appellee testified, in substance, that, when the car stopped, she got on the platform and was in the act of entering the door of the car with her baby in her arms when the car suddenly started forward and threw her against the door and afterwards against one of the seats. But there was no evidence in her behalf that the car was started in a reckless manner or with an unusual or unnecessary jerk or lurch. Witnesses for the appellant testified that the car was started in the usual

For the authorities in this series on the subject of negligence in starting a street car while a passenger is attempting to board car, find a seat, or alight, see last foot-note of *Nolan v. Newton St. Ry. Co.* (Mass.), 38 R. R. R. 378, 61 Am. & Eng. R. Cas., N. S., 378; third head-note of *Knuckey v. Butte Elect. Ry. Co.* (Mont.), 37 R. R. R. 757, 60 Am. & Eng. R. Cas., N. S., 757; second head-note of *Orth v. Saginaw Valley Traction Co.* (Mich.), 37 R. R. R. 588, 60 Am. & Eng. R. Cas., N. S., 588.

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manner, and that there was no violent or unnecessary or unusual jerk or lurch, and that appellee was not carrying her child when she fell, but that the child was in the aisle of the car ahead of her, and she was caused to fall by the fact that in passing from the platform into the body of the car she stepped upon her dress, tripped, and fell. We may therefore say that, under the evidence, the case for the appellee must rest upon the ground that the operators of the car were negligent in starting it before she had opportunity to get to a seat or be seated. The negligence, if any, consisted, not in the manner in which the car was started, but in the fact that it started before appellee, who had her baby in her arms, had opportunity to get inside the car and to a seat.

[1] With the evidence in the condition stated, the court, in instruction No. 2, told the jury that: "If they believed from the evidence that on the occasion mentioned the train was started suddenly, with a reckless or unusual jerk or lurch, and that the plaintiff was thereby thrown down and was injured thereby, or if the jury believe from the evidence that when the plaintiff got upon the platform of the car and was about to enter the car she was carrying her child in her arm, and that by reason of such fact, if it was a fact, she required more than usual care, and that her situation, if such it was, was, or by the exercise of the highest degree of care upon their part would have been, reasonably apparent to the defendant's agents or any of them in charge of the car, and that such agents started the car before the plaintiff was seated in the car, and that the plaintiff was thereby thrown down and was injured thereby, then the law is for the plaintiff, and the jury should so find." In another instruction the "highest degree of care" was thus defined as: "The highest degree of care which prudent persons engaged in the operation of cars propelled by electric power exercise for the safety of passengers under similar circumstances to those under investigation in this case." Under the instruction the jury was authorized to find a verdict for the appellee if they believed from the evidence that the car was started with a reckless or unusual jerk or lurch, or if they believed that appellee's condition or situation was such as to impose upon the operators of the car the duty of exercising unusual care for her safety. So much of this instruction as authorized the jury to find for the appellee if the car was started with "a reckless or unusual jerk or lurch" should not have been given, as there was no evidence whatever upon which to submit this theory of the case to the jury.

[2] Another objection to the instruction is that it allowed a recovery if the jury believed that the appellee, in entering the car with her child in her arm, "required more than usual care, and that her situation, if such it was, was, or by the exercise of

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the highest degree of care upon their part would have been, reasonably apparent to the defendant's agents or any of them in charge of the car, and that such agents started the car before the appellee was seated in the car, and that the plaintiff was thereby thrown down and was injured thereby." Under this instruction the jury were in substance and effect told that, if the situation of appellee imposed upon the persons in charge of the car the duty of exercising more than usual care, appellee was entitled to recover if they started the car before she was seated, thus putting upon the company as a matter of law a higher duty and degree of care than should have been imposed. If the situation or condition of appellee required more than usual care on the part of the agents in charge of the car in starting it, and her situation and condition was reasonably apparent to them, then it was their duty before starting the car to have allowed appellee a reasonable opportunity to get seated. Or, to put it in another way, it was for the jury to say (1) whether appellee's condition was such as to require the operators of the car to exercise more than usual care, (2) whether by the exercise of the highest degree of care her condition or situation could have been discovered by or was reasonably apparent to the operators of the car, (3) whether they failed to allow her reasonable opportunity to take a seat in the car before starting it. To entitle appellee to recover, it was necessary that all three of these conditions should exist, and it was for the jury to say, under proper instructions, whether they existed or not. It was as much the province of the jury to pass upon one of these questions of fact as the other, and the existence of each of them was necessary to make out a case for appellee. The operators were not required as a matter of law to hold the car motionless until appellee was seated. They were only required to hold it motionless until she had a reasonable opportunity to be seated. Although the jury might have believed that her situation was known to the operators of the car, and that it demanded unusual care upon their part, yet, if they allowed her reasonable time and opportunity to take a seat before starting the car, and she failed to avail herself of the time and opportunity so allowed, the company would not be liable. The view we have of the law of the case was incorporated in an instruction offered by counsel for appellee, but not submitted, in which the jury were told that: "* * * After getting upon the platform of the car, the plaintiff, with her child still in her arm, attempted to enter the door of the car, and if the jury shall believe from the evidence that, under these circumstances, the exercise of the highest degree of care for the plaintiff's safety required that the defendant's agents in charge of the car and controlling its movements should have allowed her a reasonable opportunity to take a seat in the car before starting it in motion, and if the jury shall believe from the evidence that the car was started in motion while the plaintiff

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was entering it carrying her child in her arm, and that she was thereby caused to fall and so sustained the injuries of which she complains, they should find for the plaintiff."

[3] It has been settled in numerous cases that a passenger who is injured by the starting of a car, unless there are special circumstances that take him out of the general rule, cannot recover unless the car is started in a violent, unusual, or reckless manner; or, in other words, started with more than the usual jerk or lurch that attends the starting of cars. Passengers who get on street cars must know that when they start there will of necessity be a sudden slight jerk or lurch accompanying the forward movement, and they must take the risk of being thrown out of balance by this movement.

[4] But it is also well settled that it is the duty of the persons in charge of street cars at all times and places and under all circumstances to exercise towards every passenger getting on, alighting from, or riding in a car, the highest degree of care which prudent persons engaged in the operation of cars exercise for the safety of passengers. But this degree of care is not in its application to all persons always the same. What would be sufficient care as to one person might not be sufficient as to another. The strong and active do not need the same degree of care to save them from injury as to children or feeble, infirm, aged persons, or persons who are incumbered with babies or bundles. It might be due care as to one to start the car when he had gotten on the platform, and to another when he entered the car door, while as to another it would be negligence to start before he had reasonable opportunity to be seated. But all these classes of persons have the right to use the car, and to each considering his age, health, and the conditions attending him the same high degree of care is due, and it is incumbent upon the operators of cars to exercise this high degree of care to discover the situation and condition of passengers so that they may be in a position to exercise towards each the degree of care his situation and condition demands. *Bennett v. Louisville Ry. Co.*, 122 Ky. 59, 90 S. W. 1052, 4 L. R. A. (N. S.) 558, 121 Am. St. Rep. 453, 28 Ky. Law Rep. 998; *L. & N. R. Co. v. Hale*, 102 Ky. 600, 44 S. W. 213, 42 L. R. A. 293, 19 Ky. Law Rep. 1651; *Yarnell v. Kansas City, Fort Scott & Memphis R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Stegv v. St. Paul City Ry. Co.*, 50 Minn. 149, 52 N. W. 393, 16 L. R. A. 379; *Shearman & Redfield on Negligence*, § 508.

[5] That the condition of appellee was such as to authorize the court to leave it to the jury to say whether she should have been allowed an opportunity to be seated before the car was started, we have no doubt.

But, for the error pointed out in the instructions the judgment must be reversed, with directions for a new trial in conformity with this opinion; and it is so ordered.

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(Supreme Court of Vermont, General Term, May 5, 1911.)

[79 Atl. Rep. 865.]

Trial—Separate Verdicts on Each Count of Declaration.—Where the counts in a declaration are based on the same cause of action, and merely vary in statement to meet the possible phases of the evidence, the issue joined on each count is the same issue, and it is proper not to require a separate verdict on each count.

Carriers—Carriage of Passengers—Liability.*—A carrier is not an insurer of the safety of its passengers.

Carriers—Injuries to Passengers—Negligence—Evidence.†—Proof of the derailment of a train and resulting injury to a passenger is prima facie proof of actionable negligence of the carrier, and to escape liability it must meet the case so made by proof equalizing it, and the passenger, having the burden of proving negligence, must then fail.

Carriers—Injuries to Passengers—Negligence—Evidence.—In an action for injuries to a passenger by the derailment of the train, the issue of the carrier's negligence held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Negligence—Evidence.—Where, in an action for injuries to a passenger by the derailment of the train, all of the counts of the declaration alleged negligent running of the train, the condition of the track was properly considered in determining whether the mode of running the train was negligent, and evidence of the condition of the ties just after the accident was admissible.

Pleading—Facts or Conclusions—Negligence—Injuries to Passengers.—A declaration, in an action for injuries to a passenger by the derailment of the train, need only allege generally negligent running of the train, without alleging the particulars.

Carriers—Injuries to Passengers—Evidence—Admissibility.—In an action for injuries to a passenger by the derailment of the train, evi-

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see last paragraph of last foot-note of *Sherman v. Southern Pac. Co.* (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407; last foot-note of *St. Louis, etc., R. Co. v. Woods* (Ark.), 38 R. R. R. 404, 61 Am. & Eng. R. Cas., N. S., 404; second foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; second head-note of *Washington, etc., Ry. Co. v. Trimyer* (Va.), 37 R. R. R. 114, 60 Am. & Eng. R. Cas., N. S., 114.

†For the authorities in this series on the subject of the presumption of negligence arising from the fact that a passenger is injured by reason of the derailment of his train or street car, see foot-note of *Pate v. Columbia, etc., Co.* (Wash.), 37 R. R. R. 752, 60 Am. & Eng. R. Cas., N. S., 752; first foot-note of *Roanoke, etc., Elect. Co. v. Sterrett* (Va.), 37 R. R. R. 749, 60 Am. & Eng. R. Cas., N. S., 749.

For the authorities in this series on the subject of the rebuttal

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dence that, just after the accident, the ties were broken and cut up, was admissible to show the condition of the ties before the accident, as to their looking rotten, as bearing on the issue of negligence.

Evidence—Opinion—Knowledge of Witness.—An objection to the testimony of a witness as to the steepness of a hill on the side of a railroad track, because he could only estimate its distance from the track, goes only to its weight, and not to its admissibility.

Appeal and Error—Questions Reviewable—Questions Not Raised in Trial Court.—An objection to evidence not raised in the court below cannot be considered in the Supreme Court.

Damages—Injuries to Passengers—Evidence—Admissibility—Loss of Earnings.—In an action for injuries to a passenger, evidence that at the time of the accident in June the passenger was under a contract to teach in a business college for a year from the following September at a specified annual salary, was admissible to show the value of her time, though she had canceled the contract after the injury, because of the belief that she could not perform it.

Evidence—Opinion Evidence—Admissibility—Speed of Train.†—One on a train at the time of its derailment may testify that it was running very fast.

Appeal and Error—Review—Error Not Shown—Redirect Examination of Witness.—The admission of testimony on the redirect examination of a witness is not erroneous, where it does not appear but it was made admissible by the cross-examination.

Damages—Personal Injuries—Medical Expenses—Evidence.—The testimony of a physician of many years' practice in a community that he had charged plaintiff suing for a personal injury \$500 for his services in attending her in consequence of the injury, and that his charge was one-half less than the regular charge, was admissible to show that his charge was reasonable.

Evidence—Witnesses—Nonresponsive Answers of Witnesses—Examination of Expert.—A nonresponsive answer of a witness furnishing relevant facts is not erroneous, because not specifically asked for, and it is only when a nonresponsive answer includes irrelevant facts that it may be stricken out, and hence, where a physician testified in a personal injury action that he had treated plaintiff for the injury received and had done the best he could for her, his statement on cross-examination, in reply to the question whether he meant that no one could have done more for her, that he had done the best for her he could "with the best possible counsel I

of the presumption of negligence arising from the fact that a passenger was injured, see last foot-note of *Roanoke, etc., Elect. Co. v. Sterrett* (Va.), 37 R. R. R. 749, 60 Am. & Eng. R. Cas., N. S., 749; last foot-note of *Gay v. Milwaukee, etc., Co.* (Wis.), 34 R. R. R. 1, 57 Am. & Eng. R. Cas., N. S., 1.

†See first foot-note of *Sherman v. Southern Pac. Co.* (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407; fifth head-note of *United Rys. & Elect. Co. v. Ward* (Md.), 38 R. R. R. 67, 61 Am. & Eng. R. Cas., N. S., 67.

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could get," was properly permitted to stand, though the quoted part of the answer was nonresponsive.

Evidence—Opinion Evidence—Knowledge of Witness.—Where a question asked a physician in a personal injury action was confined to the natural result of the injury received, his answer, confined to the question based on adequate data, was not objectionable, though on his cross-examination he admitted that the result was not always the same, but that he had to consider the treatment and that he did not take that into account in his answer.

Trial—Reception of Evidence—Time for Objection—Cross-Examination.—Error, if any, in admitting testimony, is not predicable on facts elicited on cross-examination after the testimony has been given.

Trial—Misconduct of Counsel—Examination of Witnesses.—Under the rule that misconduct of counsel in getting inadmissible evidence before the jury by improper means is reversible, the action of plaintiff's counsel in asking a proper question as to why a nonresident expert witness for plaintiff was not present, after the court had sustained objections to improper questions to prove that fact was not misconduct requiring a new trial.

Witnesses—Redirect Examination—Injuries to Passengers—Inferences from Cross-Examination—Rebuttal.—Where, in an action for injuries to a passenger by the derailment of the train, alleged to have been caused by defective rails, a witness for defendant testified on cross-examination that defendant relaid the rails after the accident, and that three-fourths of them were relaid elsewhere, defendant on redirect examination was entitled to show that three-fourths of the rails were relaid in the main track to replace worn or broken rails, to rebut the inference of negligence.

Evidence—Relevancy.—The introduction of evidence that could have been excluded on objection does not necessarily open the door to the adverse party to introduce incompetent evidence; but, where the evidence introduced tends to render a disputed fact more probable, even if so remote as not to be admissible as legal evidence, the adverse party may introduce testimony rebutting such evidence.

Carriers—Carriage of Passengers—Care Required.*—A carrier of passengers must exercise the care of a careful man in the same circumstances, and the degree of care required in a particular case must be commensurate with the circumstances calling for the exercise of care.

Carriers—Carriage of Passengers—Care Required—Instructions—"Very"—"Excessive."*—An instruction, in an action for injuries to a passenger by the derailment of the train, that the carrier must exercise the utmost caution characteristic of very careful and prudent men, is erroneous as imposing on the carrier too high a degree of care; the word "very" meaning exceedingly, excessively, and the word "excessive" meaning exceeding what is usual or proper.

*See foot-note on p. 153.

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Carriers—Injuries to Passengers—Action—Negligence.—Where, in an action for injuries to a passenger by the derailment of a train, plaintiff relied on negligent running of the train, unsafe roadbed, and negligent management of the train in allowing a suit case to remain on the racks in the car, and showed that in consequence of the derailment the suit case fell on her, the refusal to apply a less degree of care to the suit case than to the train was not erroneous, since the injury inflicted by the suit case was due to the derailment, and, if negligence was established as to the derailment, the carrier was liable, regardless of its care concerning the suit case; no diverting force having intervened.

Carriers—Injuries to Passengers—Evidence.—Where the declaration, in an action for injuries to a passenger, alleged in separate counts the same cause of action, and merely varied the statement to meet the possible phases of the evidence, and the evidence supported all the counts, the refusal to charge that, unless the essential elements of negligence alleged in some one count were established, no recovery could be had, and that no recovery could be had on a state of facts formed by a combination of all the counts, was proper.

Appeal and Error—Excessive Damages—Power to Set Aside Verdict.—The Supreme Court on exceptions has the power to set aside verdicts because excessive, where the trial court has failed to do so.

Exceptions from Orleans County Court; Eleazer L. Waterman, Judge.

Action by Arabelle Parker against the Boston & Maine Railroad. There was a verdict and judgment for plaintiff, and defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Williams & Dane and *Harland B. Howe*, for plaintiff.

Young & Young, for defendant.

ROWELL, C. J. This is case for negligence. On June 26, 1909, the plaintiff was a passenger on the defendant's north-bound express train, No. 41, known as the Boston & Montreal Air Line train, where it was derailed on the "Snake Alley" section of the road 12 miles north of Wells river. She was sitting at the time on the left side of the car on the end of the seat next to the aisle, and, as she instinctively threw up her right arm, it was hit and injured on the elbow by a dress-suit case that was thrown from a rack on the opposite side of the car.

The declaration contains three counts. The first is based upon negligent, careless, and unskillful running of the train, whereby the car in which the plaintiff was riding was derailed and thrown from the track, and the injuries complained of inflicted. The second count is based upon unsafe roadbed and track, negligent and

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unskillful running, and derailment. The third count is based upon negligent and unskillful running, control, and management of the train, unsafe and unfit cars, and negligence and carelessness in suffering and allowing heavy dress-suit cases and traveling bags to be and remain upon the shelves and racks in the car in which the plaintiff was riding, by reason whereof such a case was suddenly and with great force thrown from a rack upon and against the plaintiff, causing the principal injuries complained of. This count does not allege derailment. The general issue is joined on the plea of not guilty.

[1] At the close of all the evidence the defendant moved for a separate verdict on each count, because the evidence failed to establish the allegations of each, because the evidence did not establish negligence on the part of the defendant in any of the respects complained of in any, and because on all the evidence the plaintiff was not entitled to recover. This motion was properly overruled. Such a practice does not obtain in this state, and ought not to obtain. It is to be noticed that the counts are not based upon separate and distinct causes of action, but upon the same cause of action, though varied in statement to meet the possible exigencies of the case that the evidence might present, and so the issue joined on each count is not a separate and distinct issue, but the same issue that is joined on the other counts. Therefore the practice asked for, if adopted, might result, and often would result, in a verdict each way on a single, indivisible issue and cause of action; whereas, there should be but one verdict, whichever way it is, as there is but one issue. Even under the Reg. Gen., Hil., 4 W. IV, a verdict cannot be entered distributively when the right is entire, but only when it is divisible. Thus, in trespass quare clausum, the defendant pleaded a general right of way for the convenience of his close, but proved only a limited right of way. Held, that the plaintiff was entitled to an entire verdict, and that the defendant could not enter it distributively for the right found for him. *Higham v. Rabett*, 5 Bing. N. C. 622, 35 E. C. L. 253. But where the plaintiff declared for a right of ferry to and from, and proved a right only from, the verdict was entered distributively; the right being divisible. *Gills v. Groves*, 12 A. D. & El. (N. S.) 721, 64 E. C. L. 721.

The practice called for by this motion would be much like splitting an entire cause of action and bringing separate suits on the parts, which cannot be done. *Bullard v. Thorpe*, 66 Vt. 599, 30 Atl. 36, 25 L. R. A. 605, 44 Am. St. Rep. 867.

The defendant also moved for a verdict on all the counts, because the defendant was not an insurer of the safety of the plaintiff while a passenger, because the evidence fails to show negligence on the part of the defendant with relation to any of the duties that defendant owed the plaintiff as a passenger, be-

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cause on the evidence the derailment was the result of some accident against which the defendant could not guard and for which it was not liable, because on the evidence the defendant exercised due care with relation to its duty as a carrier and fully discharged its duty to the plaintiff, and because on all the evidence the plaintiff is not entitled to recover.

[2] While it was sound to say that the defendant was not an insurer of the safety of the plaintiff, that is hardly a ground on which to base a motion for a verdict, so we pass that proposition without further comment.

[3] As to the evidence not showing negligence on the part of the defendant, but showing due care: These grounds of the motion cannot be sustained, for the derailment itself was *prima facie* evidence of such negligence and want of such care. This is so generally held that it is unnecessary to cite cases in support of it. But the defendant says that such is not the law of this state, but that here negligence must be proved and cannot be presumed, and so it must, and it was proved, *prima facie*, by proving the fact of derailment, which gave the case to the plaintiff on this point, unless the defendant met it by counter proof sufficient, not to overbalance the proof afforded by the derailment, but to equalize it, for then the plaintiff would fail, as the burden of showing negligence on the part of the defendant did not shift, but remained on the plaintiff throughout, and at the end she must have held her case good on this question and at the requisite legal height against all counter proof. *Harrison's Adm'r v. Northwestern Ins. Co.*, 80 Vt. 148, 66 Atl. 787; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 444, 11 Sup. Ct. 859, 35 L. Ed. 458.

The presumed peculiar knowledge of the carrier is the reason for saying that derailment is *prima facie* evidence of negligence, as shown by *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398. That was an action against common carriers for negligence in not transporting property to its destination within a reasonable time. The court said that the unusual and unexplained delay and failure to deliver the property, according to the general course of business, raised a natural presumption of negligence, and was sufficient *prima facie* evidence of want of due care; that it was by no means incumbent upon the plaintiff to prove that there was not some unavoidable accident or other unforeseen occurrence that would relieve the carrier from this natural presumption; that to require the plaintiff, in making out a *prima facie* case, to assume the burden of negating the occurrence of matters out of the usual course of events and peculiarly within the knowledge of the carrier, would be an extraordinary perversion of the natural and ordinary rules of evidence.

[4] As to the derailment being the result of some accident against which the defendant could not guard and for which it

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is not liable: The testimony on the part of the plaintiff tended to show that the track where the accident happened had a number of reverse curves, on one of which the derailment occurred, and on which the rails on the west side of the track were worn on the inside from a quarter of the way to all way to the web; that immediately after the accident the ties were found broken more or less where the wheels ran over them, and some of them were rotten, and spikes were pulled out of some where the rails were turned over; that the west rails were turned over nearly the whole length of the train; that some of the spikes on the inside of the rails were drawn sufficiently to let the rails out from under the heads of the spikes; that the worn condition of the rails extended 10 or 12 rods each way from the place of accident; and that the rails were worn more or less on every curve between there and East Barnet station. The accident, as we have said, happened the 26th of June. The train left Wells River that day at 3:55 p. m., 20 or 25 minutes late, and was derailed 12 miles north of there at about 4:15. It was very hot that day, and had been for several days.

The plaintiff's theory of the accident is that some of the ties at the place of derailment being unsound; the outer rails on the curve being worn on the inside from half way to the web to all the way; the train running too rapidly around the curves—the track was insufficient and gave way, causing the injury complained of.

The defendant claims that the accident was caused by a "kink" or "kick-out" of the west rail where the engine left the iron when it struck that point. It says that the plaintiff had advanced no theory to account for the accident; that the most that can be drawn from her evidence is that there were a few ties somewhat decayed and the rails somewhat worn; but that no witness testified to, and no evidence tended to show, such a condition of the track before the accident as to render it unsafe, nor to lead any one to the opinion or belief that it was unsafe; that the witnesses who testified to seeing worn rails and rotten ties before the accident did not suggest that the wear was sufficient, nor the rotten ties numerous enough, to affect the safety of the track. The defendant's theory is that the excessive heat, the action of the wheels on the track, and the slight departure of the track from a level in the vicinity of the accident, caused the rails to crawl and expand so that the rail that "kicked out" from the expansion, heat, and crawling, came in contact with the end of the next rail so firmly that, when the engine struck the rail that had the "kick-out," the strain on it from the heat and the contact with the other rail, combined when the strain that the engine gave it when it struck it, caused the rail to "kink" under the train, and permitted the wheels on the opposite side of the engine to drop

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to the ties, so that the west rail canted to the west, letting the wheels of the engine follow along in the throat of the rail as it went until the engine came to a stop. The defendant also claims that its evidence showed that it was impossible by inspection before the accident to detect the strain, or that the ends of these two rails were so close together as to be dangerous, and that no evidence was introduced that this could be detected or determined.

This claim and theory is based largely upon the testimony of the defendant's division civil engineer, a man of wide experience in railroad construction. He testified that, from the investigation he made of the track immediately after the accident, his opinion was that it was caused principally by the expansion of the rails; that the heat the day of the accident and for a few days before was excessive; that the rails gradually moved together so that the ends came in contact with one another; that it was possible that, when such another train went down, it shoved the rails a little; that when the train in question came up it took the curve all right and went about halfway on it to this point that was just right to spring out, that when the front of the engine struck that point it did spring out, letting the wheel on the opposite side drop in; that the rail canted, and the flange of the engine followed upon the web of the rail. He further testified that, from his study and knowledge of those matters, it is a fact that rails do get out in that way under trains; that a man would have to watch the track very close to tell when rails come up so close together that they become dangerous; that he did not think he could do it; that iron and steel are so susceptible to climatic conditions as regards heat that in constructing tracks an allowance is always made for expansion, which, he said, is a power he did not know how to cope with in respect of steel, which varies with the temperature. The defendant's testimony further tended to quarter of an inch in a difference of from 40 to 50 degrees of temperature. The defendant's testimony further tended to show that there is no known means of guarding against such an accident as it claims this was, unless it happens at such a time that it is discovered by an inspection of the track; that, if it happens when the train hits the joint, there is no means of guarding against such an accident.

Thus it appears that the testimony was conflicting as to the cause of the accident, and therefore, as said in *Gleeson's Case*, above cited, it was for the jury to say, in the light of all the testimony, under the instructions of the court, whether the relation of cause and effect existed, as claimed by the defendant, between the accident and the asserted exonerating facts and circumstances.

The remaining ground of the motion is that on all the evi-

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dence the plaintiff is not entitled to recover. It is obvious from what has been said that the court could not direct a verdict for the defendant on this ground, and the motion was properly overruled.

[5] We come now to consider the defendant's exceptions to the admission and exclusion of evidence. The plaintiff offered to show the condition of the ties just after the accident as to being broken and cut up, for the purpose of showing their condition before the accident. The defendant objected that it was admissible only in connection with testimony tending to show changes in condition. It insisted that the plaintiff should state under what count it was offered, claiming that it was admissible only under the second count at most, as no other count alleged unsafe roadbed and track. But the court refused to require the plaintiff to state under what count she offered the testimony, but admitted it generally, and the defendant excepted. But the testimony was admissible under all the counts, though some of them did not allege unsafe roadbed and track, for all ellege negligent and unskillful running, and the condition of the track was an element to be considered in determining the character of the running in that respect. *Chicago, etc., Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960; note, 7 Am. & Eng. Ann. Cas. 991.

[6] This is so because it was not necessary to allege the condition of the roadbed and track, as it was enough to allege generally negligent and unskillful running, without alleging in what it consisted. Thus, in case for inducing the plaintiff's wife to continue absent, it is sufficient to state the fact of persuasion, etc., without stating the means used. So in actions for diverting water or obstructing a right of common way, etc., it is sufficient to allege generally a diversion or a disturbance, without showing how it was done. 1 Chit. Pl. (13th Am. Ed.) *391; *Clark v. Employer's Liability Co.*, 72 Vt. 458, 466, 48 Atl. 639.

[7] The testimony was also admissible to show the condition of the ties before the accident, certainly as to their looking rotten, for that condition must have antedated the accident.

The exception to the admission of the photograph of the wreck because not properly verified cannot be sustained, for there was testimony tending to show that it was a substantially correct likeness of the wreck.

[8] The objection to the admission of Moore's testimony to the steepness of the hill west of the track, because he could only estimate its distance from the track, went to its weight rather than to its admissibility.

The plaintiff was allowed to show that at the time of her injury she was under contract to teach in a business college for a year from the following September at a salary of \$855.

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The defendant objection that the testimony was "inadmissible, immaterial, and improper evidence here," and excepted to its admission. It now objects that that was a matter of special damage, and should have been specially alleged.

[9] But, it not appearing that this objection was made below, it cannot be made here. We have decided this so often that it has become trite.

[10] But the defendant says that, under a state of pleading making evidence of special ability admissible, this evidence would not be admissible; that the question would then be: What was her time reasonably worth? But, taking that to be the question, the testimony was admissible as tending to show the value of her time. Thus, in an action by a practicing physician for damage resulting from personal injury, the true test was held to be what his services might fairly be expected to be worth to him in his business. *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567. So in *Nebraska City v. Campbell*, 2 Black, 590, 17 L. Ed. 271, the plaintiff in error was a practicing physician, and evidence was given that he was engaged in extensive practice at the time of the injury, and that it was a period of great sickness in the community, and it was held that evidence was pertinent to show the extent of the plaintiff's ordinary business, and to lay a foundation to enable the jury, with some degree of certainty, to ascertain the direct and necessary damage sustained by the injury. *Wade v. Le Roy*, 20 How. 34, 15 L. Ed. 813, is to the same effect.

It was held in *Richmond & Danville R. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728, which was an action for personal injuries negligently inflicted, that it was error to admit evidence in respect to the probability of the plaintiff's promotion in the service of his master and a consequent increase of wages; that it was enough to show what the plaintiff had in fact been deprived of, to show his physical health and strength before the injury, his condition after the injury, the business he was engaged in, the wages he was receiving, and perhaps the increase he would receive by any fixed rule of promotion; but that beyond that it was not right to go by introducing testimony that simply opened the door to a speculation of probabilities. *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128. And here is where the line is drawn, between speculation and reasonable certainty, and the testimony we are considering falls on the side of reasonable certainty, for the higher wages were fixed by a contract in force at the time of the injury, and whether it was in force at the time of the trial is immaterial, for, if it was not, it was because she canceled it after the injury, thinking that she could not perform it, as her testimony tended to show she could not.

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[11] It was not error to allow a witness who was on the train at the time of the accident to testify that it was running "very fast." 3 Wig. Ev. § 1977, and notes.

[12] As to Dr. Gaines' testimony in redirect examination that he did not think he should be able to improve the plaintiff's elbow, it is enough to say that it does not appear but it was made admissible by the cross-examination if not otherwise admissible.

[13] The doctor further testified that he had attended the plaintiff every day from the time of her injury to the time of trial, and on several occasions had visited her twice a day, and had dressed her arm every day; that he had done everything he possibly could for her, and had charged her \$500 for his services. He was then asked whether that was or was not less than usual, ordinary, reasonable charges for such services in that vicinity, and he said it was one-half less. The defendant seasonably objected that the question was immaterial; that whether reasonable or unreasonable was the only question; that the way to show that was to show what he did, and what the regular charges therefor would be in that vicinity; and excepted to the admission of the answer. But the testimony did show what the doctor did, though not just how he did it, which was not necessary, and the answer showed in a general way what a reasonable charge would be in that vicinity, for he had practiced there many years, and so must have known about the charges, and, when he said that his bill was one-half less than the regular charges, he was saying, though in an argumentative way, what the regular charges were.

On cross-examination the doctor was asked, referring to his saying that he had done the best he could for the plaintiff, whether he meant to say that no one could do more for her, and he answered that he had done the best he could, "with the best possible counsel I could get." The defendant asked to have the last part of the answer stricken out as nonresponsive, which was refused.

[14] But there is nothing per se wrong in a nonresponsive answer. It is wrong only when it includes irrelevant facts, in which case, especially when the witness is not a party, and the examiner is not to blame, it may be struck out and the jury directed to ignore it. But, if it furnishes relevant facts, then they are none the less admissible merely because they were not specifically asked for. 1 Wig. Ev. p. 886 (2). Here the part objected to included a fact relevant to the witness' qualification for treating the plaintiff, and so no error.

[15] Dr. Longe, called by the plaintiff, saw her arm for the first time the 15th of December. He testified to its condition then, and what he discovered, but did not testify what the injury was, nor know what the treatment had been. He was

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asked on redirect examination, subject to objection and exception, what in his opinion would be the natural result of an injury to the elbow, such as he said the plaintiff received, with respect to synovitis, swelling, inflammation, blood poison, stiffness; and he answered that in a fracture of that kind there is usually more or less synovitis, sometimes blood poison, and stiffness and loss of motion; but that none of these conditions always follow.

The objection to the question was that it should show the basis for the opinion called for, otherwise it could not be told, and therefore the opinion could not be met by counter proof; and that the natural results of a fracture of that kind would be different from the results in this case.

The only objection here made to the admission of this testimony is based upon what the witness said on cross-examination after the question was answered, to the effect that the answer was based upon the fact that there was a fracture involving the joint and an injury to the ulna nerve; that those two elements do not always produce the same results; that you have to consider the treatment in order to determine the probability of recovery of a fractured arm; that he did not take that into account in his answer; that the treatment and the extent of the injury are material elements in determining the probable results of a fracture; and that these matters were not considered in making his answer. From all this it is argued that the effect of the testimony was to tell the jury that the natural result of such an injury as the plaintiff received was just the result she claimed to have, without sufficient data, as to elements determinative of the result to be expected, to enable the witness nor the jury to say whether the results were the natural results of such an injury or were due to improper medical treatment. But in this argument sight is lost both of the question and the answer, for the question is confined to the natural results in respect of getting synovitis, swelling, inflammation, blood poison, and stiffness, and the answer is as restricted as the question; and there is nothing to show that the data the doctor said he based his opinion upon were not adequate.

[16] And, besides, error in admitting the testimony, if any there was, is not predicable of facts elicited on cross-examination after the testimony was given.

[17] The plaintiff testified that Dr. Scudder of Boston examined her arm in October, and that she asked her brother in Boston to arrange with Dr. Scudder to come as a witness, and had before her a letter from Dr. Scudder to her brother concerning the matter. She was then asked if she could afford to pay Dr. Scudder his price of \$200 a day as a witness, and she said, "No." The defendant objection. Thereupon the court asked plaintiff's counsel if they proposed to introduce the

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letter, and they said, "No." Her counsel then said they offered to show by her just what they asked her. The court excluded it. The plaintiff now claims that the question was answered without objection. But we think it was not so treated by court nor counsel in the time of it, and therefore we do not so treat it. Counsel then offered to show by her that she could not afford to pay the doctor's price for coming. To this the defendant objected because the price was contained in a letter not produced. The court excluded it. Then counsel offered to show by her that the doctor asked \$200 a day and expenses, and that she could not afford to pay it. To this the defendant made the same objection, and then the court excluded it. Then counsel asked her if she could afford to pay the doctor to come as a witness, and the court, of its own motion, excluded it. Counsel said that the offer was different from any they had made; but the court thought it practically the same, and allowed the defendant an exception to the asking of the question, which was not answered.

The defendant claims that to ask the very question that had just been excluded was such gross misconduct as to entitle it to a new trial; that it was a deliberate attempt to prejudice the jury against it, and to convey the impression that, if Dr. Scudder was a witness, his testimony would be favorable to the plaintiff; and that he was absent only because the plaintiff was not able to pay him for being present.

The plaintiff claims, on the other hand, that error is not predicable of the mere asking of a question; that it was competent for her to account for Dr. Scudder's absence, to avoid any unfavorable inference against her because of it; and that it was not error to ask the question because it was not the same question covered by the offers; and, if it was, still, in its final form, it was proper, and a responsive answer would have been admissible, and we think it would. There was therefore no error in asking the question, for the misconduct that vitiates consists in getting inadmissible evidence before the jury, not through the door of the law, but by "climbing up some other way." *Rudd v. Rounds*, 64 Vt. 432, 441, 25 Atl. 438; *Chicago City Railway Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112, 6 Am. & Eng. Ann. Cas. 220, and note.

[18] A witness for the defendant testified on cross-examination that the defendant relaid the rails through "Snake Alley" after the accident, and that three-fourths of them were relaid elsewhere. On redirect examination the witness was asked where in the track they were relaid. The plaintiff objected that that was immaterial. Thereupon the defendant offered to show by the witness that three-fourths of them were relaid in the main track between Newport and White River Junction, to replace rails that were worn, injured, or broken. The question and the offer were excluded, and the defendant excepted.

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There are several other exceptions that are not specially considered. Some of them are virtually disposed of by what has already been said. Some present questions not likely to arise again, as they sprang out of transient circumstances and incidents of the trial. And, if others involve questions that may arise again, they can scarcely present the same aspect they now present.

Judgment reversed, and cause remanded.

SOUTHERN RY. CO. v. MORGAN.

(Supreme Court of Alabama, Feb. 9, 1911.)

[54 So. Rep. 626.]

Carriers—Passengers—Contributory Negligence.*—It is not negligence as a matter of law for a passenger to alight from a moving train, but there may be circumstances attending an attempt to do so which will justify the court to declare such conduct negligence per se.

New Trial—Injuries to Passengers—Contributory Negligence—Evidence.—In an action for injuries to a passenger while alighting from a moving train, evidence held to require the grant of a new trial because the weight of the evidence supported defendant's plea of contributory negligence.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by the Southern Railway Company against William C. Morgan. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Warren C. Brown, for appellant.

Virgil Bouldin, for appellee.

SAYRE, J. Plaintiff sued for damages for personal injury, alleging in the most general way, after stating the relation of passenger and carrier between him and defendant, that defendant so negligently operated one of its cars, a part of the train upon which he was, that by reason of such negligence he received great personal injuries, setting them out according to their nature and extent. The case made by the evidence of-

*See foot-note of *Puget Sound Elect. Ry. v. Felt* (C. C. A.), 38 R. R. R. 597, 61 Am. & Eng. R. Cas., N. S., 597; second head-note of *Illinois Cent. R. Co. v. Massey* (Miss.), 38 R. R. R. 587, 61 Am. & Eng. R. Cas., N. S., 587; second head-note of *Chesapeake, etc., Ry. Co. v. Wills* (Va.), 37 R. R. R. 577, 60 Am. & Eng. R. Cas., N. S., 577.

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ferred on behalf of plaintiff was as follows: Plaintiff, his daughter, Mrs. Lemley, and Mrs. Lemley's child, an infant in arms, had purchased tickets and had taken passage to Limrock. The witnesses with one accord say that the train stopped at Limrock. The evidence was in conflict as to the length of the stop, but there was enough making for plaintiff's view of the case to justify the jury in finding that the stop was so brief that these passengers had not a reasonable time within which to safely alight. Further, plaintiff's case, construed most favorably to him, was that in the effort to alight he had reached the steps of the car just at the moment the train started again, and thence a sudden jerk of the train caused him to fall or be thrown to the ground. The jury must have found in accordance with the stated version of the facts, and thereupon the plaintiff was entitled to a verdict. But it is insisted that, conceding the jury were authorized to find that the stop was so short as not to afford a reasonable time for alighting from the train, yet the great weight of the evidence went to show that plaintiff was guilty of a lack of due care on his part, contributing to some extent and proximately to his injury, and therefore that the trial court erred in overruling defendant's motion for a new trial.

We feel constrained to say that we concur in this view of the case. We will state our view of the facts. Plaintiff and his daughter were sitting near the front door of the car. When Limrock station was announced, they prepared to alight. Plaintiff had a suit case in his right hand. His daughter had her babe on her left arm. The daughter led the way. Plaintiff followed as closely after as he could. Mrs. Lemley testified: "I was going down the steps when the train started, father right behind me. As he started down the steps, the train gave a quick jerk and jerked my hold loose. It was going so fast I fell off. And while I was falling—pa was right in behind me and he—we started down the same steps, and I fell off first, and it was going so fast it threw him above me. We were even with the depot platform when the train started. I was on the steps coming down when the train started. It started, and jerked my hold loose, and pitched me out. * * * I seen my father on the ground. I did not see him as he fell. * * * When pa fell off the train was past the end of the depot—far end of the platform." And on cross-examination: "Pa left the train pretty quick after I did. I seen him when he hit the ground. I didn't have to turn around. I said, 'Lord have mercy! Pa is on that train,' and just then I saw him hit the ground." Plaintiff testified: "Just as we made our way to step off of the first step the train jerked and started, and broke my hold loose, and I went one way and she the other. * * * The train was going as fast as a man could walk when it jerked

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me off; jerked my hand loose from handle bar. The fast part was not the trouble. It was the jerk that done the work; jerked my hand loose and jerked hers loose. I cannot tell how much faster train was going when I fell off than when my daughter fell off. * * * Train pitched me head foremost. I had suit case in my right hand. My daughter fell out in front, and I fell out sideways on my right side. * * * I had left hand hold of the iron bar, and I had suit case in my right hand. My face was next to depot when I recollect I passed the depot." It is certain that, whether Mrs. Lemley was thrown by the starting of the train, or whether she voluntarily stepped off after the train had started forward, the flagman caught her, so that, as it appears, neither she nor her babe suffered harm. It was well substantiated, and we do not construe plaintiff's testimony to the contrary, that plaintiff reached the ground one to two car lengths from the place where the flagman caught his daughter. Meantime the train had gathered speed. It seems clear that the jerk incident to the starting of the train did not dislodge plaintiff from the train. Plaintiff and his daughter alone testified that there was a jerk. On the other hand, Haney and Claybrook, witnesses for plaintiff, both of whom were on the train and were apprised of the accident immediately thereafter, observed nothing unusual in the movement of the train. This was corroborated by Clyde Gentle, for whom both parties vouched by using him as a witness, and who boarded the train at Limrock, and saw the accident.

If the evidence for the defendant be laid out of view, it may be possible to account for Mrs. Lemley's experience by referring it to the mere starting of the train as she was in the act of descending from the step, and this notwithstanding her own and plaintiff's careful insistence upon it that there was a jerk. And if she had been injured and were prosecuting this suit in consequence, we would not deny her right to recover. But the movements and hurt of plaintiff cannot with probability be accounted for in that manner. He fell at a different time and place. On plaintiff's evidence it seems highly probable that plaintiff voluntarily stepped or jumped from the train after it had been stopped at the Limrock station and had been again set in motion. The evidence adduced by the defendant makes it about as certain as any conclusion can be which depends on human testimony. Witnesses Brown, Gentle, and Bulman, who lived in the neighborhood, and who seem to have no interest in or connection with the defendant, testified that the plaintiff and his daughter stepped or jumped from the train after it had begun to move away from the station. These are corroborated by Atchley, who was defendant's station agent, and by Short, who was at the time a flagman on defendant's train, but had severed his connection with it before the time of the

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trial; and all these witnesses testify that the flagman called to plaintiff to wait while he was yet on the steps. Plaintiff denies that he heard this, and we will assume that he did not; but, whether he did or not, this evidence clearly shows that plaintiff's actions indicated his purpose to get off the train without waiting for it to be stopped, and, in connection with that already quoted, leads irresistibly to the conclusion that he voluntarily and unnecessarily stepped or leaped from the train while in motion.

It has been laid down that it is not negligence as a matter of law to alight from a moving train. But it is obvious that there may be circumstances attending an attempt to do so in which it becomes the duty of the court, where the testimony is undisputed, to declare the passenger's conduct negligent per se. *Hunter v. L. & N. R. R. Co.*, 150 Ala. 594, 43 South. 802, 9 L. R. A. (N. S.) 848. In the case at bar it is made to appear without contradiction that the plaintiff had not been at Limrock for 20 years. He had entered his sixty-fifth year. He had recently been ill and was weak. He carried a suit case in his right hand. It was dark. He had just come out of a lighted car. Under these conditions he blindly stepped or leaped from a train which was moving so rapidly as to cause him to fall heavily to the ground. Furthermore, he left the car on the left side as it moved. Incumbered as he was, it is highly probable that he stepped off in a direction perpendicular to the train's line of motion, as several of the witnesses testified, or even with his face towards the rear of the train, according to the testimony of one of them. His own testimony leaves room for no other conclusion than that he stepped sidewise from the car. Under these circumstances, while it cannot be said there is no evidence to support plaintiff's case, the great weight of the testimony supported defendant's plea of contributory negligence, and it is our judgment that the motion for a new trial should have been granted. *L. & N. R. R. Co. v. Lee*, 97 Ala. 325, 12 South. 48; *Central R. R. Co. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 505.

In order that the case may be submitted again to a jury, which will exercise its judgment of the facts as they may then appear, a reversal will be ordered. It is unnecessary to consider other propositions advanced by the appellant. They cannot recur under the same conditions as now presented.

Reversed and remanded. All the Justices concur.

KEARNEY v. OREGON R. & NAV. CO.

(Supreme Court of Oregon, May 23, 1911.)

[115 Pac. Rep. 593.]

Carriers—Injury to Passenger.—In an action for injuries to a passenger, evidence held sufficient to show that a jar of the train threw plaintiff forward, and that he fell off the platform through an open vestibule door.

Trial—Question for Jury.—Where there is any evidence that reasonably supports plaintiff's theory, the case must go to the jury.

Carriers—Injuries to Passenger—Negligence—Evidence.—In an action against a railroad company for injuries to a passenger, evidence held sufficient to go to the jury on the question of negligence of defendant's employees in leaving the door of a vestibule open.

Carriers—Injury to Passengers—Duty of Railroad.*—A vestibule on a railroad car with the doors closed cannot be said as a matter of law to be a dangerous place, and to leave the doors open when the cars are still in rapid motion is an omission justifying an inference of negligence.

Carriers—Injuries to Passenger—Contributory Negligence—Evidence.†—In an action by a passenger against a railroad company for injuries from being thrown through an open vestibule by a sudden jerking of the car, where it did not appear the plaintiff knew that the vestibule doors were open, held, that the question of plaintiff's contributory negligence in going upon the platform was for the jury.

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action by C. M. Kearney against the Oregon Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 112 Pac. 1083.

This is an action for damages for personal injuries to plain-

*For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to opening and closing doors, see last foot-note of *Clanton v. Southern Ry. Co.* (Ala.), 37 R. R. R. 120, 60 Am. & Eng. R. Cas., N. S., 120; last foot-note of *Christensen v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253.

†See fifth head-note of *Brice v. Southern Ry. Co.* (S. C.), 37 R. R. R. 178, 60 Am. & Eng. R. Cas., N. S., 178; first foot-note of *Norvell v. Kanawha, etc., Ry. Co.* (W. Va.), 37 R. R. R. 148, 60 Am. & Eng. R. Cas., N. S., 148; first head-note of *Clanton v. Southern Ry. Co.* (Ala.), 37 R. R. R. 120, 60 Am. & Eng. R. Cas., N. S., 120; third head-note of *Central of Georgia Ry. Co. v. Brown* (Ala.), 37 R. R. R. 197, 60 Am. & Eng. R. Cas., N. S., 197.

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tiff, resulting from alleged negligence of defendant while plaintiff was a passenger upon defendant's railway train.

There is evidence on plaintiff's behalf tending to show that on May 28, 1909, plaintiff entered the coach in which he was riding at Umatilla, and that the train reached Pendleton about 2:35 a'clock in the morning. The car was a vestibule car with a door on each side and trapdoors in the floor over the steps. Plaintiff was seated with two companions, Hughes and Gard, and did not leave his seat until the brakeman announced Pendleton—plaintiff's destination—when they were something over a mile west of the station. Thereafter plaintiff and his two companions arose, put on their overcoats, and plaintiff took his grip, preparatory to leaving the train. When about 900 feet from the station, Hughes walked out upon the front platform, Gard following and plaintiff a few feet behind. Gard stepped down on the steps of the north side of the car, and Hughes stood at the head of the steps on the platform. Both doors of the vestibule were open, and there was evidence tending to show that the south door had been opened at Echo, several miles below Pendleton, to permit a passenger to alight, and that it had not been closed thereafter. Hughes and Gard testified that the last time they observed plaintiff he was standing just inside the car door facing the platform; that a short distance below the station the train slowed up considerably, causing a heavy jerk; that they got off at the station; and that, after assisting the chief of police, who was plaintiff's brother, to arrest some tramps suspected of robbery, and after going up into town, they became anxious about plaintiff's non-appearance, and, in company with his brother, they went down the track to look for him, and found him lying on the south side of the track, about 700 feet west of the station. He was helpless and unable to speak, and it was claimed that his injuries were such as to render him incapable of appearing as a witness in his own behalf. Other facts appear in the opinion.

At the close of plaintiff's testimony, defendant moved for a nonsuit, which was refused. Plaintiff had a verdict, and defendant appeals.

W. A. Robbins (*W. W. Cotton, Carter & Smythe, and Arthur C. Spencer*, on the brief), for appellant.

R. J. Slater and J. H. Raley (*Fee & Slater*, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). While the evidence might not appear to all minds to be conclusive, we are of the opinion that it was sufficient to justify the court in submitting the case to the jury. Plaintiff was standing on the door of the car immediately before the jerk of the train occurred, and a very few minutes after, when Hughes looked for

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him, he had disappeared; and the evidence tends to show that he was found just about where the witnesses locate the place where the jerk occurred. It is not unreasonable to suppose that he was thrown through the front door of the car upon the platform, and fell from there through the open south door of the vestibule, thereby receiving the injuries which he suffered. While it is true that courts will not accept evidence of witnesses which is contradicted by absolute physical facts, yet they are cautious in the application of this rule, and in the case before us it can have no application. A natural and reasonable inference from the facts testified to by plaintiff's witnesses is that the jar of the train threw him forward, and that, burdened as he was with his suit case, he was unable to recover himself and fell off the platform through the side door. Accidents of this character, while infrequent, do happen sometimes. Thus in *Fitch v. Mason City & C. L. Traction Co.*, 116 Iowa, 716, 89 N. W. 33, we have the case of a person sitting on a seat near the door of a car and being thrown bodily off the seat and out through the door upon the roadway beneath. In *Coudy v. St. Louis Iron Mountain & Southern Railway*, 85 Mo. 79, the plaintiff, a boy, arose from his seat to pick up a bundle that had fallen on the floor, when a sudden checking of the speed of the car threw him down the aisle, through the open door of the car, out upon the platform, and from there down the steps to the ground. These two instances came to the attention of the writer of this opinion while looking up other branches of this case, and the facts of both are more unusual than those upon which plaintiff predicates a recovery here, where in our opinion plaintiff's theory seems a natural and reasonable one.

[1] It is true that there is strong contradictory evidence on behalf of defendant; but where there is any evidence that reasonably supports plaintiff's theory, the case must go to the jury and its verdict is conclusive.

[2] We think that there was evidence sufficient to go to the jury upon the question of negligence of defendant's employees in leaving the door of the vestibule open.

[3] The object of having vestibuled trains is to assure the safety of persons who have occasion to go upon the platform. Except at stations, it was the duty of defendant to use diligence to keep the vestibule closed, and there is some evidence tending to show a lack of diligence in this instance.

[4] A vestibule with the doors closed cannot be said as a matter of law to be a dangerous place. In fact, it is nearly as safe as the car itself, and to leave the doors open when the cars were still in rapid motion was an omission from which a jury would be justified in inferring negligence.

It is urged that plaintiff was guilty of contributory negligence

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in going upon the platform. But, under the circumstances, we think this was a question of fact for the jury. There are many cases cited by defendant where it has been held to be contributory negligence for a person to ride upon an open platform or to attempt to alight from a moving train. But counsel has cited but one case where this doctrine has been applied to going upon a platform protected by a vestibule. This is the case of *Ward v. Chicago & N. W. Ry. Co.*, 165 Ill. 462, 46 N. E. 365. The question here involved does not seem to have been involved in that case. The train had made a stop at a place not a station, and the plaintiff, supposing it might be the place of destination, stepped into an unlighted vestibule, and fell through a swinging door upon the ground. The court said that plaintiff had no business upon the platform, and had no right to attempt to leave the car, and that his doing so was negligence. The case is not clear, and is remarkable for its loose language and exquisite injustice, and is distinguished in *Robinson v. Chicago & A. R. Co.*, 135 Mich. 254, 97 N. W. 689, where a contrary doctrine is held. The evidence does not show that plaintiff knew that either of the vestibule doors were open, though it is possible from the position of his two friends that his attention may have been drawn to the condition of the north door. We cannot say that he was guilty of negligence in doing just what people very generally do when their destination is announced, get up, put on their overcoats, take their grips, and get as near the vestibule as possible, so as to be able to get off the car as soon as the train stops and the doors are opened.

[5] At all events, his care or want of care was a question of fact for the jury and not of law for the court.

The judgment is affirmed.

BEAN, J., took no part in this decision.

FOX v. MINNEAPOLIS & ST. L. RY. CO.

(Supreme Court of Minnesota, May 19, 1911.)

[133 N. W. Rep. 374.]

Carriers—Duties—Rights of Person Entering Train.*—A railway company is under no duty to hold a train at a way station to give a person who has gone on a train for a conference with a passenger time to alight therefrom, or to aid such person in getting off the train safely by giving signals or lighting the station platform; the trainmen having no notice that such person was about to leave the train, and having in no way assented to his going on the train for said purpose.

Carriers—Injury to Trespasser.*—A person who goes upon a train to confer with a passenger thereon, without giving the trainmen notice of his so doing, or obtaining their assent thereto, assumes the risk of the train starting without signals while he is getting off, and of the unlighted condition of the platform.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Edward H. Fox against the Minneapolis & St. Louis Railway Company. From an order directing a verdict for defendant, plaintiff appeals. Affirmed.

Thomas C. Daggett and *E. B. Graves*, for appellant.

W. H. Bremner, *Geo. W. Seevers*, and *Eugene Bryan*, for respondent.

SIMPSON, J. This action was brought by plaintiff to recover for an injury claimed to have been caused by defendant's negligence. Upon the trial the court, on motion of the defendant made at the conclusion of plaintiff's testimony, directed a verdict for the defendant. The plaintiff, by this appeal, questions the correctness of the court's ruling granting such motion for a directed verdict. The facts here material, as disclosed by the evidence, are as follows:

The plaintiff had been employed at Gibbon for several months. On the evening of August 2, 1909, he had an appointment with one Colton to meet him in the smoking car of a train of the defendant company which reached Gibbon about 11:27 that night. When the train arrived in Gibbon, the plaintiff came around the end of the train, ran along the side of the cars, and got on the

*For the authorities in this series on the subject of the care due trespassers on trains, see foot-note of *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753; last paragraph of second foot-note of *Welch v. Boston* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35.

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train at the end of the smoker. He walked through the smoker, saw that Colton was not there, went out at the front end of the car, and attempted to get off the train. As he stood with one foot on the bottom step of the car, feeling for the platform with his other foot, the train started and swung him around, and he fell from the train, receiving a serious injury. The station platform was unlighted, and it was a dark night. The plaintiff saw or heard no signals given of the starting of the train. The train remained standing at the platform a shorter time than the usual stop at that station, as theretofore observed by the plaintiff. The plaintiff did not see either the conductor or brakeman of the train, and informed no one connected with the train of his intention of getting on or getting off the train.

[1] From this statement of the facts it is apparent that the plaintiff was not a passenger upon defendant's train; that the trainmen, having no notice of plaintiff's boarding and attempting to alight from the train, and having in no way assented to his doing so, were not charged with any duty to hold the train for his convenience, or to aid him in alighting safely from the train, by giving signals of the starting of the train or otherwise. The absence of light on the station platform was apparent to plaintiff, and the company neither expressly nor impliedly extended to him an invitation to use the unlighted platform to get on and off its train for his own personal purposes. The evidence failed, therefore, to show any negligence on the part of the defendant causing the injury.

[2] Further, the plaintiff knew this was a way station, that this train made a short stop there, and that the platform was not lighted at this time. In going on the train without notifying the trainmen, he assumed the risk of the train starting at any time, and of receiving an injury as a result of the known conditions. It follows that the action of the trial court in directing a verdict was justified and required. In *Klugherz v. C., M. & St. P. Ry. Co.*, 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384, and *Sullivan v. M., St. P. & S. S. M. Ry. Co.*, 90 Minn. 390, 97 N. W. 114, 101 Am. St. Rep. 414, is discussed at some length the duty a railway company owes persons using depot grounds and platforms, not for the transaction of business with the company, but in a usual and reasonable manner as an incident to the business of the company with others. The principles announced in those cases, so far as applicable, sustain the action of the trial court in this case. There is a suggestion made in appellant's brief that the plaintiff might have become a passenger on the train. Such fact is not made to appear in any way by the evidence.

The order of the court below, denying plaintiff's motion for a new trial herein, is affirmed.

ST. LOUIS & S. F. R. CO. *v.* KITCHEN.

(Supreme Court of Arkansas, April 10, 1911.)

[136 S. W. Rep. 970.]

Removal of Causes—Proceedings in State Court.—When, from the whole record, including the petition, it appears that a cause is removable from the state to the federal court for diversity of citizenship, the state court should accept the petition and bond, and proceed no further.

Removal of Causes—Jurisdiction Dependent on Citizenship—Complaint.—Where the petition for the removal of a cause from the state to the federal court, because of diversity of citizenship, is in accordance with the allegations of the complaint, the complaint may be looked into to determine whether the cause is removable.

Removal of Causes—Diversity of Citizenship.—A suit brought in a state court outside of the federal court district of the plaintiff's residence is not removable to the federal court on the petition of the defendant who is a resident of another state, for Act Cong. March 3, 1887, c. 373, 24 Stat. 552, §§ 1, 2, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), provides that, where the jurisdiction of the federal court is founded upon diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant, and suits of a civil nature brought between citizens of different states may be removed to the federal court of the proper district by the defendant, and to allow a removal in this case would take the case into the wrong district; this being true even though the plaintiff originally brought his action in the wrong district.

Carriers—Passengers—Who Are Passengers.*—A tie inspector of another railroad, who was, with consent of the defendant railroad, riding on its train in order to examine certain ties bought by his master, while not technically a passenger, is entitled to the same care as a passenger, his condition being analogous to that of an express messenger, and this duty is not lessened by an Oklahoma statute which provides that a carrier of persons without reward must use ordinary care for their safety, as that statute obviously applies to persons carried gratuitously, and not by virtue of a contract.

Carriers—Personal Injuries—Actions—Instructions.—In an action for the death of plaintiff's husband who was killed while riding on defendant's train, which was backing at the rate of 12 or 15 miles an hour around a curve grown up with weeds to such an extent that the view was largely cut out, and which was derailed by running

*For the authorities in this series on the question whether the employee of others are passengers while being transported by a railroad company without paying fare, see first foot-note of *Southern Ry. Co. v. Harrington* (Ala.), 36 R. R. R. 148, 59 Am. & Eng. R. Cas., N. S., 148.

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over a cow, charges to the jury, which said nothing about the backing of the train, but submitted only the question as to the manner of running the train with reference to its speed and the position of the engine in the train, were not erroneous, even though there was no question for the jury under the evidence as to whether the backing of the train was an act of negligence, for in determining whether there was negligence in operating the train the jury had to consider the speed, together with the position of the engine.

Carriers—Carriage of Passengers—Contributory Negligence—Dangerous Position—Jury.—In an action by a wife for the death of her husband who was killed on defendant's tie train, on which he was making trips to inspect ties, it is a question for the jury whether he was guilty of negligence in riding on the top of the train with the foreman in charge.

Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

Action by Cassie Kitchen against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Evans, T. S. Buzbee, and B. R. Davidson, for appellant.

Manning & Emerson, for appellee.

MCCULLOCH, C. J. The plaintiff, Cassie Kitchen, instituted this action in the circuit court of Crawford county against defendant railroad company to recover damages resulting from the death of her husband, George T. Kitchen, which is alleged to have been caused by negligence of defendant's servants while he, the said George T. Kitchen, was riding on one of defendant's trains in the state of Oklahoma. The trial of the case resulted in a verdict in favor of plaintiff, and defendant appealed.

The first question presented is upon the ruling of the trial court in refusing to enter an order of removal to the federal court. It is alleged in the complaint that the plaintiff is a citizen and resident of the city of Little Rock, Ark. This city is within the territorial jurisdiction of the United States Circuit Court for the Eastern District of Arkansas. Crawford county, where the action was pending, is in the Western District. The petition for removal filed by defendant is in regular form and states that the petitioner "was at the time of the commencement of this suit, and still is, a resident and citizen of the state of Missouri, being a corporation created and organized under the laws of the said state of Missouri," and "that the plaintiff, Cassie Kitchen, was at the time of the commencement of this suit, and still is, a citizen and resident of the state of Arkansas."

[1] When it appears from the whole record, down to and including the petition for removal, that a case is removable, then

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it is the duty of the state court to accept the petition and bond and proceed no further.

[2] The allegations of the complaint may be looked to, when not in conflict with the statements of the petition for removal, in order to determine whether or not the case is removable. *Texarkana Tel. & Tel. Co. v. Bridges*, 75 Ark. 116, 86 S. W. 841; *Burlington, etc., R. Co. v. Dunn*, 122 U. S. 514, 7 Sup. Ct. 1262, 30 L. Ed. 1159.

Here the statement of the complaint, in substance, that the plaintiff is a citizen and resident of the Eastern district of the federal court is not in conflict with the statement of the petition that the plaintiff is a citizen and resident of the state of Arkansas. For the purpose of determining the question of removability, the allegations of the complaint in this case may therefore be considered.

[3] This presents squarely the question whether or not a suit brought in a state court outside of the federal court district of the plaintiff's residence is removable on petition of the defendant, who is a citizen and resident of another state. The federal statute provides (section 1 of the Act of Congress of March 3, 1887, c. 373, 24 Stat. 552, as amended by the Act of Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 2 of the same statute, granting the right of removal, provides that "any other suit, of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, * * * may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

The contention of the defendant is that a plaintiff, by bringing suit in a district other than that of his or her residence, waives the objection on that account to a removal, and that the defendant may remove it notwithstanding the fact that the suit has been brought in the wrong district. We think this question has been decided adversely to defendant's contention by the Supreme Court of the United States in the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. The decision of that court on the question is, of course, binding upon us. Learned counsel for the defendant insist that the *Wisner* Case has been overruled by later cases, but we do not think so. The *Wisner* Case was one where a citizen of Michigan sued a citizen of Louisiana in a court of the state of Missouri. The defendant filed a petition to remove the case to the federal court. The Supreme Court of the United States decided that the case was not removable because of the fact that it could not have been

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instituted originally in the federal court of that district, which was not the district of the residence of either the plaintiff or defendant. Chief Justice Fuller, in delivering the opinion of the court, said that: "In view of the intention of Congress, by the act of 1887, to contract the jurisdiction of the Circuit Court and of the limitations imposed thereby jurisdiction of the suit could not have obtained, even with the consent of parties."

In later cases, *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, and *Western Loan Company v. Mining Company*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, the above-quoted language of the Chief Justice was held to be dictum and was disapproved; but the decision upon the facts disclosed was not overruled. In the *Moore Case* it was held to be removable on the ground that the plaintiff, after the removal into the federal court, had appeared in that court and taken substantive steps in the case which amounted to a waiver, and the case was distinguished from the *Wisner Case* on that point. Judge Brewer, in the opinion in the *Moore Case*, commenting on the difference between the two cases, said that "the plaintiff in that case never consented to accept the jurisdiction of the United States court, while in this case both parties had consented by their conduct." Following those decisions, as we understand them, we hold that the case could not be removed.

Plaintiff's husband, George T. Kitchen, was, at the time of his injury and death, a tie inspector for the Chicago, Rock Island & Pacific Railway Company, and was riding on one of defendant's trains in the state of Oklahoma which was engaged in loading on its cars, for transportation, railroad ties along the line of its road which were the property of the Rock Island Road. As the ties were loaded for transportation, Kitchen inspected and counted them for his employer. He was allowed to ride on the train, as it traveled from place to place for the purpose of picking up the ties; but he paid no fare. This particular train did not carry passengers, but was engaged exclusively in hauling the railroad ties. There was a box car in the train called the "office car," which was fitted up with desks, etc., for the use of the men in their work in connection with the shipment of the ties, and also with beds where the men, including Kitchen, slept. There was also a caboose. At the time plaintiff was injured, the train was backing at a speed of 12 or 15 miles per hour. The caboose was in front and the office car next, followed by the other cars of the train, 21 in all, and the engine last. Kitchen and one Nelson, an employee of defendant who was called the foreman of the tie train, were riding on top of the office car, the foreman having gone there, presumably, on account of the excessive heat of the day, and Kitchen, when he went to the top of the car, remarked to one of his companions that he thought it was the safest place to ride. The conductor of the

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train was in the cupola of the caboose. It was in the evening about dark, or a little before, and the backing train struck a cow, and a portion of the train was derailed; the office car being completely turned over. Kitchen was caught under it and instantly killed. It is alleged in the complaint that the railroad track along that place was considerably curved, that the defendant had negligently permitted grass and weeds to grow on the right of way high enough to obscure from the vision of trainmen stock straying on the right of way and track, and that the servants of the defendant were guilty of negligence and violation of the laws of the state of Oklahoma in failing to keep its right of way properly fenced, on account of which negligence the cow, which caused the derailment of the train, was permitted to stray upon the right of way and the track. Negligence is also alleged in backing the train at a high rate of speed.

[4] It is earnestly insisted by learned counsel for defendant that Kitchen was not a passenger, and that defendant owed him no duty except the negative one not to wantonly injure him. In support of this contention, they stress the fact that Kitchen did not pay any fare and was not asked to pay fare, and that in order to constitute himself a passenger he must have tendered himself as such to be carried upon a train dedicated to the carriage of passengers and must have been accepted by one who was authorized to receive passengers. We do not think this contention is a sound one. According to the undisputed evidence Kitchen was permitted to ride on the train for the purpose of performing service for his employer, the Chicago, Rock Island & Pacific Railway Company, for whom defendant company was then engaged in transporting railroad ties. He represented his employer, the shipper, and must be treated in the same light as if he, himself, was the shipper and, as a part of the contract of carriage, was permitted to ride for the purpose of shipping his commodity. His relations with the defendant as a carrier were much the same as that of a shipper of cattle, riding on a drover's pass, or as that of an express messenger or railway mail agent who is being transported by the carrier under contract with its employer. Under such circumstances, this court, and all other courts which have passed upon the question, so far as we are advised, have held that, while such a person is not, technically, a passenger, the carrier owes him the same duty as if he were a passenger; that is to say, the highest degree of care consistent with the practical operation of the train which he accepts as the means and mode of transportation. *Little Rock & Ft. Smith Ry. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Voight v. B. & O. Ry. Co.* (C. C.) 79 Fed. 561.

In *Fordyce v. Jackson*, *supra*, which was a case where the person injured was an express messenger, Chief Justice Cockrill,

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speaking for the court, said: "It is true there was no express contract between the plaintiff and the railway company; but, as the railway company undertook to carry him, it was bound to use every reasonable precaution to carry him safely. He could recover, therefore, in tort, just as any passenger may, for a violation of this general duty. All the cases upon this and analogous questions are to that effect."

Mr. Hutchinson says on this subject that: "As a general rule every one not an employee, being carried with the express or implied consent of the carrier upon a public conveyance usually employed in the carriage of passengers, is presumed to be a passenger." 4 Hutchinson on Carriers, § 997.

In another place the same learned author says this (section 1018): "It seems that if the person who is injured by the negligence of the carrier's employees is lawfully upon its conveyance, even though he is not strictly a passenger, he will be entitled, in the absence of a contract on his part to the contrary, to the same care and diligence for his safety as when he is strictly a passenger."

Some reliance is placed, as to the degree of care, on the Oklahoma statute, which provides that "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." No decision of the Oklahoma court construing that statute has been brought to our attention; but, manifestly, it could only refer to persons who are carried gratuitously, as on a free pass, and does not cover cases where persons are carried on contract, either express or implied, even though customary fare be not paid.

It is next insisted that the railroad company owed deceased no duty to fence its right of way, notwithstanding the requirement of the Oklahoma statute, and that neither owed a duty to keep the right of way clear of weeds and brush, and that these omissions cannot be considered as the proximate cause of the injury.

It has been decided, under similar statutes, that the requirement is supposed to have been intended for the protection of all persons upon railroad trains who are exposed to dangers of travel, and that the person injured, by reason of the omission to comply with the statute, was entitled to recover on account thereof. *Railway Co. v. Humes*, 115 U. S. 522, 6 Sup. Ct. 110, 29 L. Ed. 463.

[5] Error of the court is assigned in giving the following instructions over defendant's objection:

"(6) The law requires the defendant to exercise the highest degree of care practicable in the running of its trains both as to speed and the manner of running it with reference to the place the engine occupies in the train, and if the defendant in this case has failed to exercise that high degree of care, which is explained

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in these instructions, in the respect just mentioned, and this want of care caused or was one of the causes of the death of Kitchen, at a time when he was exercising ordinary care for his own safety, you should find for plaintiff."

"(11) It is for you to say, among other things, whether or not Kitchen was wanting in ordinary care for his own safety considering all the circumstances that surrounded him at the time. It is also for you to say whether or not the defendant is guilty of negligence in any of the respects assigned; that is, as to the fence, the keeping of the right of way cleared, and the manner of running the train as to speed and position of the engine in the train. These are to be determined by all of the facts and circumstances in the case."

Error is also assigned in refusal of the court to give the fifth instruction requested by defendant: "(5) It is charged that the train was negligently backed, in that it was backed too rapidly. I charge you that there is no evidence that would warrant you in concluding that the train was backed too rapidly. You will therefore not consider the rate of speed at which the train was moving as tending to prove negligence."

It is said that there is no evidence to show that it constituted negligence to back the train under the circumstances, and that for this reason the court erred in giving the instructions mentioned above and in refusing the one requested by defendant. It will be noted, however, that in the instructions given the court said nothing about the backing of the train, but submitted only the question as to the manner of running the train with reference to its speed and the position of the engine in the train. If we should hold that, under the evidence in this case, the question of the backing of the train was not one to be considered by the jury as an act of negligence, still there was no error in these instructions, because, under the evidence adduced, it became a question for the jury to consider the speed of the train, together with the position of the engine in the train, in determining whether or not there was negligence in the operation of the train.

The next question in the case, and one which has given the court most serious concern, is as to the contention that Kitchen was guilty of contributory negligence in riding on top of the train, and that the trial court should have so declared that as a matter of law. Defendant relies upon the case of *Railway Co. v. Miles*, *supra*, where, under a special finding of the jury that a shipper riding on a drover's pass was injured by reason of being on top of a car, this court held that he was guilty of contributory negligence which precluded a recovery of damages from the railroad company. Judge Smith, in delivering the opinion in that case, said that: "A passenger who voluntarily and unnecessarily rides upon the engine or the tender, or upon

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the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence." That was a case, however, where the shipper was riding on a train which carried him as a passenger, where a place was provided for him to ride, and where he had, without authority from the conductor, deserted the place set apart for the carriage of passengers and had gone on top of the train.

[6] The facts of the present case are vastly different. Here the train was not carrying passengers and was not engaged on a regular run. It was going from place to place, picking up the railroad ties, first going backward and then forward. Those who were riding on the train had the right, to some extent, to consider the question of their own safety and to determine where the best place was for them to ride for their own safety and convenience. The foreman in charge of the train was on top of the car, and Kitchen went there with his consent, or at least, by his acquiescence, and the conductor was near them and acquiesced in their presence there. In the same case Judge Smith said this: "Another duty is to occupy a seat inside of the car provided for passengers when a seat is to be had. The conductor is charged with the administration of these rules, and doubtless if the passenger rides in an improper place, for example, in the baggage, express or postal car, or in a caboose attached to the train or on the platform, by the conductor's permission, or with his acquiescence, this would exempt the passenger from blame, and, in case of accident to him resulting from the company's negligence, he might recover damages."

The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Winters v. B. & O. Rv. Co.*, 177 Fed. 44, 100 C. C. A. 462, states the controlling principle here, where, under circumstances not dissimilar, it was held that the question should be submitted to the jury whether or not an injured party was guilty of negligence.

There are other alleged errors of the court pressed upon our attention; but, on consideration, we conclude that they are not well founded, and that they are not of sufficient importance to call for discussion here. Suffice it to say that the evidence is legally sufficient to sustain the finding of the jury upon the allegations of negligence which were submitted to the jury by the court in the instructions given. The instructions correctly submitted those questions to the jury and properly limited the consideration to the allegations of negligence which the evidence tended to sustain.

Finding no error in the record, the judgment is affirmed.

LUGNER *v.* MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin, May 2, 1911.)

[131 N. W. Rep. 342.]

Carriers—Carriage of Passengers—Existence of Relation—Evidence.—Evidence held to justify a finding that one was a passenger on a street car at the time of his ejection.

Carriers—Carriage of "Passenger"—Existence of Relation.*—One does not need to have paid his fare, or even to have entered a carrier's car, to become entitled to the rights of a passenger; but if he has entered the carrier's station with the good faith intent to take passage and ability to pay his fare, he becomes a passenger, and, if he has boarded a car prepared and willing to pay his fare in case he could not obtain a free ride, the fact that he asks for a free ride does not deprive him of his character as a passenger; it being the refusal to pay fare on proper demand or the entry upon a car, with intent not to pay, which has such effect.

Carriers—Carriage of Passengers—Wrongful Conduct of Conductor—Assault in Ejecting Person on Car—Scope of Employment.†—It is the duty of the conductor of a street car to eject persons who refuse to pay fare, and if, in his endeavor to carry out such duty, he makes a wrongful assault upon a person, such course is within the

*For the authorities in this series on the subject of the existence of the relation of carrier and passenger as affected by failure to purchase ticket or pay fare, see last paragraph of foot-note of *Thompson v. Nashville, etc., Ry.* (Ala.), 34 R. R. R. 171, 57 Am. & Eng. R. Cas., N. S., 171.

†For the authorities in this series on the question whether a person may be a passenger before he boards a train or street car, see last foot-note of *Philadelphia, etc., R. Co. v. Crawford* (Md.), 38 R. R. R. 14, 61 Am. & Eng. R. Cas., N. S., 14; last foot-note of *Schuyler v. Southern Pac. Co.* (Utah), 37 R. R. R. 521, 60 Am. & Eng. R. Cas., N. S., 521; first head-note of *Texas Midland R. Co. v. Geraldton* (Tex.), 37 R. R. R. 106, 60 Am. & Eng. R. Cas., N. S., 106; second head-note of *Metcalf v. Yazoo, etc., R. Co.* (Miss.), 36 R. R. R. 743, 59 Am. & Eng. R. Cas., N. S., 743.

For the authorities in this series on the question whether a master is liable for the malicious and willful torts of his servants, see foot-note of *Berryman v. Pennsylvania R. Co.* (Pa.), 38 R. R. R. 728, 61 Am. & Eng. R. Cas., N. S., 728; foot-note of *Moore v. Atchison, etc., Ry. Co.* (Okla.), 37 R. R. R. 776, 60 Am. & Eng. R. Cas., N. S., 776; first foot-note of *Baltimore, etc., R. Co. v. Strube* (Md.), 37 R. R. R. 319, 60 Am. & Eng. R. Cas., N. S., 319.

For the authorities in this series on the question what acts are, and are not, within the scope of employment of a railroad employee, see last foot-note of *Alabama, etc., Ry. Co. v. Sampley* (Ala.), 38 R. R. R. 528, 61 Am. & Eng. R. Cas., N. S., 528; first foot-note of *Duval v. Seaboard A. L. Ry.* (N. C.), 36 R. R. R. 532, 59 Am. & Eng. R. Cas., N. S., 532; last head-note of *Heilig v. Southern Ry. Co.* (N. C.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501; second head-note of *Conchin v. El Paso, etc., R. Co.* (Ariz.), 36 R. R. R. 192, 59 Am. & Eng. R. Cas., N. S., 192.

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scope of his employment, though not authorized by his master, for which the master is liable.

Carriers—Carriage of Passengers—Ejection of Passengers—Liability.—Where a street car conductor wrongfully ordered from the car a boy who was a passenger, kicking at him as he jumped off, and the boy ran around the rear of the car, whereupon the conductor thrust his head and shoulders out of the rear window, and the boy, thinking that the conductor was attempting to grab him, was so frightened that he jumped into the side of a car on the other track and was injured, the conductor's appearance at the window was simply the concluding act of his endeavor to prevent the boy from riding on the car, his conduct being one continuous wrongful action, rendering the carrier liable for the injuries, though he, in fact, made no motion to grab the boy from the rear window.

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Action by Harry Lugner, by his guardian, against the Milwaukee Electric Railway & Light Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant operates a street railway system in Milwaukee, and this action is brought by the plaintiff for personal injuries resulting, as is alleged, from an assault and improper ejection from one of the defendant's cars by the conductor, on the evening of January 10, 1908. The plaintiff, a boy 15 years and 4 months of age, had been skating with several boy companions on the evening in question at a park in the western part of the city, some distance from his home and returned homeward, reaching the corner of Clybourn and Thirty-Fifth streets at about 9:30 o'clock. The Clybourn Street line of the defendant's railways ends here, and a car had just arrived at the terminus and was standing on the north track, preparing to start eastward as the boys arrived at the corner. The plaintiff and one of his companions, named Guy Raymond, 14 years of age, started for the car as it was standing still, intending to get a free ride, if possible; the conductor had just opened the vestibule doors on the south side and swung the trolley around, and at this time was just about starting the car eastward. At this point the accounts of the transaction differ as to what followed.

The plaintiff testifies that Guy asked for a free ride to Twenty-Seventh street just before they got on the car; that the conductor said nothing in reply to the question, and they got on the rear platform and repeated their request, when the conductor was near the stove in the middle of the car, and that he turned and ran towards them, with his hands up above his head, and said, "Get off, or I will kick you off;" that they immediately started and jumped off, and as they were doing so the conductor, who was then on the back platform, kicked at them; that he and

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Guy both jumped, facing eastward, each having hold of one of the brass handholds, and ran along two or three steps with the car; that by that time the car had passed over the switch from the north to the south track and was about at the crossing of Thirty-Fourth street; that Guy ran off to the south, and he (plaintiff) thought perhaps the conductor was coming off the car, and he ran around the rear of the car to the north, and, as he was passing the rear trolley window, the conductor reached out of the window and grabbed at him, and he gave a jump to the north and jumped right into a west-bound car, just passing on the north track, and was knocked down and run over, and received injuries necessitating the amputation of one foot and seriously impairing the other. He further testified that when the conductor rushed at them and raised his foot it frightened him, and he did not know what he was doing, and when the conductor grabbed at him from the trolley window it frightened him still more; that he had a nickel and two car tickets in his pockets at the time, and was ready to pay his fare, if he could not get a free ride. Guy Raymond corroborated the plaintiff's version of the transaction, while two other boys of the party, Ivo Lanning and Lewis Stearns, who stood on the sidewalk and watched to see whether Harry and Ben would get a ride, also gave testimony substantially corroborating plaintiff's story, so far as they were able to see the transaction.

The conductor testifies that when the boys asked if they could have a ride he said, "Yes," if they had any money, and they said they did not, and he said they could not ride free, and told them to get off the car, and they got off, but came back on the step; that this was before the car started, and he told them to get off again, because he was going to start the car, and that they got off, and he started the car; that the two boys had hold of the handholds and ran along with the car until the car got across the switch; that he told them to let go, and then they ran away, one going south to the sidewalk, and the other north around the back end of the car; and he thought perhaps the boy was hanging onto the car on the north side, so he leaned out of the rear trolley window, but did not see the boy, and then the west-bound car came along and the accident happened, and he at once stopped his car. The conductor absolutely denied rushing at the boys, or kicking at them or grabbing at the plaintiff, and denied that he threatened to kick them off.

The jury returned the following special verdict: "Question 1. Was Harry Lugner, the plaintiff, injured by coming in contact with and being knocked down and run over by a west-bound car of the defendant at or near the west crossing of Thirty-Fourth and Clybourn streets, in the city of Milwaukee, on January 10, 1908? Answered by the Court: 'Yes.' Question 2. Did the plaintiff, Harry Lugner, board the defendant's east-

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bound car, No. 342, at Thirty-Fifth street, on which Arthur Miller was conductor? Answered by the Court, with consent of counsel: 'Yes.' Question 3. Was the relation of passenger and carrier existing between the plaintiff and the defendant at the time plaintiff was on defendant's east-bound car, just before he was injured? Answer: Yes. Question 4. Did the conductor, Arthur F. Miller, assault said plaintiff while upon or leaving the said car? Answer: Yes. Question 5. If you answer question No. 4 'Yes,' was the conductor at the time of such assault acting within the scope of his employment? Answer: No. Question 6. If you answer question No. 4 'Yes,' were the injuries of the plaintiff proximately caused by such assault? Answer: Yes. Question 7. Did the conductor willfully strike at the plaintiff from the rear window of the car, with the intention of doing bodily injury to the plaintiff by violence? Answer: No. Question 8. If you answer the seventh question 'Yes,' then answer this question: Was the plaintiff within striking distance at the time the conductor made a motion towards him through the rear car window, if you find such motion was made? Answer: No. Question 9. If you answer the seventh question 'Yes,' then was the conductor acting within the scope of his employment in making a motion at the plaintiff through the rear car window? Answer: No. Question 10. Did the defendant's conductor eject the plaintiff from the car No. 342 in an improper manner? Answer: Yes. Question 11. If you answer question No. 10 'Yes,' were the plaintiff's injuries proximately caused by such improper ejection from the car? Answer: Yes. Question 12. What sum will compensate the plaintiff for the injuries he sustained? Answer: \$5,000."

Motions by the defendant to change the answers to questions 3, 4, 6, 10, and 11 of the verdict from "Yes" to "No," and for judgment on the verdict as so amended, and for judgment, notwithstanding the verdict, were successively overruled, and the court changed the answer to the fifth question from "No" to "Yes," and entered judgment for the plaintiff upon the verdict as so amended. From this judgment, the defendant appeals.

Van Dyke, Rosecrantz, Shaw & Van Dyke, for appellant.

Christian Doerfler and Glicksman, Gold & Corrigan, for respondent.

WINSLOW, C. J. (after stating the facts as above). [1] There was sufficient evidence to justify the finding that the plaintiff was a passenger on the street car at the time of his ejection.

[2] One does not need to have paid his fare, or even to have entered the car, to have become entitled to the rights of a passenger. If he has entered the station with the good faith intent to take passage, and ability to pay his fare, he becomes to all intents and purposes a passenger. *Karr v. M. L. H. & T.*

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Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017. If, as the plaintiff testifies, he was prepared and willing to pay his fare in case he could not ride free, the fact that he asked for a free ride does not deprive him of his character as a passenger. It is the refusal to pay on proper demand or the entry upon the car, with intent not to pay, which has this effect.

[3] The court was unquestionably right in changing the answer to the fifth question from "No" to "Yes." If, as the jury found, there was an assault committed by the conductor, it was confessedly committed while he was ejecting the plaintiff from the car for nonpayment of fare. It is the conductor's duty to eject persons who refuse to pay fare, and, if he wrongfully ejects a person who has already paid or is ready to pay his fare, because, as he thinks, such passenger has not paid or will not pay his fare on demand, it is a wrongful act within the scope of his employment, for which his principal is liable to respond. The fact that the act is wrongful does not of itself take it without the scope of his employment. His duty is to see to it that passengers pay their fare and to properly eject them if they do not; of course, his master does not authorize him to commit a tort in performing that duty, but if in his endeavor to carry out that duty, he ejects the wrong person or commits a tort, such as was found to have been committed here, it is a tort within the scope of his employment, though not authorized by his master. *Johnston v. C., St. P., M. & O. R. Co.*, 130 Wis. 492, 110 N. W. 424.

The chief contention of the appellant is that the answer to the seventh question in connection with the evidence of the plaintiff himself acquits the defendant of liability. The plaintiff testified that as he went around the back end of the car to the north the conductor leaned out of the rear trolley window and grabbed at him with his hand, and it frightened him, "and I gave a jump, one jump, and jumped right into the other car."

[4] The argument is that by this testimony the plaintiff has definitely fixed the proximate cause of his fright, and the resulting collision with the west-bound car to be the grab or motion which he alleges that the conductor made at him out of the rear window of the car, and has thus eliminated from consideration the previous alleged assault and ejection from the car, and in fact everything which preceded the grab from the rear window. Such being the case, the defendant claims that when the jury found, in answer to the seventh question, that the conductor did not strike at the plaintiff from the rear window they negatived the tortious act which, by the plaintiff's own testimony, was the sole proximate cause of his injury. One difficulty with this contention is that the seventh question and answer, taken together, do not negative the making of a hostile motion by the conductor out of the rear window. It is a complete negative

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pregnant; it finds that the conductor did not willfully strike at the plaintiff, with the intention of injuring him by violence. It does not find that the conductor did not strike at the plaintiff at all, but by inference finds that he did make a striking motion out of the rear window, but without willful intent to injure the plaintiff thereby. Bliss on Code Pleading, § 332. Further the conductor admits that he went to the rear window at this exact time and leaned his body out of it. So it is a fact that the conductor appeared at the window, and, even admitting that the conductor made no motion with hostile intent, it seems certain, nevertheless, that the plaintiff saw him when he so appeared.

By the conductor's own statement his appearance at the window was simply the concluding act of his endeavor to successfully and finally prevent the boys from riding on the car. The transaction was one continuous wrongful action from the time when, as the jury found, he started down the middle of the car towards the boys, until he thrust his head and shoulders out of the rear window, to see that neither of them was hanging on to the north side of the car. There is really no place where a division line can be drawn; all the conductor's acts, including the last, were a part of the improper ejection which the jury say by finding 11 proximately caused the plaintiff's injuries. The improper ejection did not cease with the kick at the car step, but only when the conductor ceased in his exertions to prevent the boys from riding.

The plaintiff testified, and the testimony is not incredible, that he was so frightened when the conductor rushed at him and raised his foot that he did not know what he was doing, and that, when the conductor appeared at the rear window and attempted to grab him, as he thought, it frightened him still more, and he jumped into the side of the west-bound car.

These considerations are decisive of the case; the findings of the jury as changed by the court are sustained by sufficient evidence and necessitate judgment for the plaintiff.

Judgment affirmed.

WESTERN & A. R. CO. *v.* DEITCH.

(Supreme Court of Georgia, March 4, 1911.)

[70 S. E. Rep. 798.]

Carriers—Carriage of Passengers—Negligence—Question of Fact.*

—Although there might be no negligence in the failure of a railroad company to have gates to the platforms of its cars, designed for the purpose of converting the platforms into a vestibule between cars, and thereby guarding against accidents to passengers by preventing them from falling or being thrown from the platforms, yet, where the cars of a particular train were equipped with the gates or doors designed for the purpose stated, whether the failure to close such doors or gates, so as to convert the platform into a closed vestibule, was negligence relatively to a child of tender years, who was a passenger on the train, and had gone upon the platform, and had fallen or walked therefrom, was a question of fact to be determined by the jury, and the court did not err in leaving that question to the jury in the present case. *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Bronson v. Oakes*, 76 Fed. 734, 22 C. C. A. 520.

Review on Appeal.—The decision on the question of negligence stated above, adversely to the defendant company, was authorized by the evidence.

Requested Charges Properly Refused.—The court properly refused the requests to charge, of which refusal complaint is made in the motion for a new trial, as the language in which the requests were framed tended to exclude from the consideration of the jury the question of fact touching the negligence of the company in the particular indicated in the first headnote.

Witnesses—Examination—Interpreters.—Although, where an interpreter is required to translate the testimony of a witness given in a foreign language, the court should, if it be practicable under the circumstances, name a disinterested person to act as interpreter, the designation of the father of the child, on whose behalf the suit was brought by his next friend, as the interpreter to translate the testimony of the child's mother, who gave her testimony in a foreign tongue, affords no ground for the grant of a new trial; it not appearing that there was any other present available as an interpreter, or who could have acted in that capacity. 7 Enc. Ev. 654, and cases cited.

Review on Appeal.—While certain paragraphs of the petition which were attacked by demurrer were not in entire conformity to the strict rules of pleading, they were not of such materiality as to

*For the authorities in this series on the question whether a railroad company is under obligation to provide vestibuled coaches, see first foot-note of *St. Louis, etc., Ry. Co. v. Oliver* (Ark.), 34 R. R. 191, 57 Am. & Eng. R. Cas., N. S., 191.

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require, a ruling that the court erred in refusing to sustain the demurrers thereto.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Moses Wright, Judge.

Action by Heinnie Deitch, by next friend, against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peebles & Jordan and *D. W. Blair*, for plaintiff in error.

Lawton Nalley, Clay & Morris and *R. W. Crenshaw*, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

ST. LOUIS & S. F. R. CO. *et al.* *v.* SANDERSON *et al.*

(Supreme Court of Mississippi, March 13, 1911. Suggestion of Error Overruled April 3, 1911.)

[54 So. Rep. 885.]

Carriers—Carriage of Passengers—Existence of Relation—Evidence.*—Where the evidence showed that decedent and another got upon the platform of a passenger train about 10 o'clock at night, attempting to ride to a certain junction one mile distant, the fare for which was five cents, that the conductor did not see them on the platform, and that they did not offer to pay fares, though the person with decedent testified that they were ready and willing to pay the fare, and expected to do so when the conductor should ask for it, whether decedent was a passenger was a question for the jury.

Carriers—Liability for Acts of Servant—Acts without Scope of Employment.†—The rule that a master is not responsible for acts

*For the authorities in this series on the subject of the existence of the relation of carrier and passenger as affected by failure to procure ticket or pay fare, see foot-note of *Thompson v. Nashville, etc., Ry. (Ala.)*, 34 R. R. R. 171, 57 Am. & Eng. R. Cas., N. S., 171.

†For the authorities in this series on the subject of the liabilities of railroads for assaults on their passengers by their employees, see last foot-note of *McDade v. Norfolk, etc., Ry. Co. (W. Va.)*, 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; foot-note of *Whitlock v. Northern Pac. Ry. Co. (Wash.)*, 37 R. R. R. 125, 60 Am. & Eng. R. Cas., N. S., 125; first foot-note of *Layne v. Chesapeake & O. Ry. Co. (W. Va.)*, 36 R. R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537; foot-note of *Teel v. Coal & Coke R. Co. (W. Va.)*, 36 R. R. R. 475, 59 Am. & Eng. R. Cas., N. S., 475; foot-note of *Rand v. Butte Elect. Ry. Co. (Mont.)*, 35 R. R. R. 480, 58 Am. & Eng. R. Cas., N. S., 480; last foot-note of *Goodwin v. Cincinnati Traction Co. (C. C. A.)*, 35 R. R. R. 477, 58 Am. & Eng. R. Cas., N. S., 477.

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of a servant outside the line of his duty, and not in the service of the master, does not apply where a railroad passenger conductor inflicts an injury on a passenger, as the extreme duty of the conductor, who is the master in such case, is to protect passengers from injury.

Appeal and Error—Review—Inconsistent Verdict—Exonerating One Joint Defendant.—An action against a railroad company and its conductor for the wrongful killing of a person by the conductor is both joint and several, and, though both may be equally liable, the liabilities are based on different legal principles, and a verdict for plaintiff against the railroad company and against plaintiff in favor of the conductor, though apparently inconsistent, presents no ground for reversal of the judgment against the company, especially in view of Codes 1906, § 4944, providing that one of several appellants will not be entitled to a judgment of reversal because of error in the judgment against another, not affecting his rights.

Appeal from Circuit Court, Monroe County; Jno. H. Mitchell, Judge.

Action by Mrs. Ida Sanderson and others against the St. Louis & San Francisco Railroad Company and another. Judgment for plaintiffs against the railroad company, which appeals; plaintiff's prosecuting a cross-appeal. Affirmed, both on the appeal and cross-appeal, on the opinion of the Commissioner.

This is a suit by the appellees, the widow and children of one J. P. Sanderson, for damages for killing of Sanderson by the conductor, Willis, in charge of a passenger train of the appellant railroad company. The record discloses the fact that Sanderson, in company with a young man named Pennington, got upon the platform of a passenger train of appellant about 10 o'clock at night, intending to ride from Amory to Aberdeen Junction, a distance of one mile. The fare was five cents. The conductor did not see these two parties on the platform, nor did they offer to pay fares, though Pennington says that they were ready and willing to pay same and expected to do so when the conductor should ask for them. The conductor testified that he did not, as a rule, work the train between these two points, but that he occasionally collected fares from persons traveling that distance, and that he did not see the deceased and his companion, nor did he know that they were on the train that night. When the train reached Aberdeen Junction, deceased and his companion got off on the side of the car, and the conductor and two of the passengers stepped off, when the conductor borrowed a pistol from one of the passengers and fired, killing Sanderson. The defense is that he did not shoot at Sanderson, and did not know he was in that direction, and that the killing was purely accidental. This question, however, was submitted

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to the jury; it being the theory of the appellees that the killing was not an accident, or that at least the conductor was guilty of gross, wanton negligence in firing the pistol. Suit was brought against the railroad company and the conductor, and the jury returned a verdict for \$10,000 against the railroad company, from which this appeal comes.

E. O. Sykes, Jr., for appellant, cites the following:

Dougherty v. Railway Co., 84 Miss. 502, 36 South. 699; *Ry. Co. v. Byrd*, 89 Miss. 308, 42 South. 286; 3 *Thompson on Negligence*, par. 2947; *Condran, Adm'x, v. Railway Co.*, 67 C. C. A. 522, 14 C. C. A. 506, 28 L. R. A. 749; *Collins v. Railway Co.*, 89 Miss. 375, 42 South. 167; *Jones v. Railroad Co.*, 163 Mass. 245, 39 N. E. 1019; *Andrews v. Railway Co.*, 86 Miss. 129, 38 South. 773; 5 *Am. & Eng. Enc. Law* (2d Ed.) 448; 6 *Cyc.* 538; *Webster v. Railroad Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Dodge v. Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; *Merrill v. Railroad Co.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Com. v. Boston & M. R. Co.*, 129 Mass. 500, 37 Am. Rep. 382; *Warren v. Railroad Co.*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *Baltimore Traction Co. v. State*, 78 Md. 409, 28 Atl. 397; *Bricker v. Railroad Co.*, 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585; *Penn R. R. Co. v. Price*, 96 Pa. 256; *Wharton on Negligence*, par. 345; *Railroad Co. v. Williams*, 91 Tex. 255, 42 S. W. 855; *Patt. Ry. Accident Law*, par. 214; *Merrill v. Railroad Co.*, 139 Mass. 238, 1 N. E. 548; *Hutch. Carr.* 447, 448, par. 554; *Snyder v. Railroad Co.*, 42 La. Ann. 302, 7 South. 582; *Railroad Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; 2 *Wood's Railroads*, 1037; *Cooley, Torts*, 653; 5 *Am. & Eng. Enc. Law* (2d Ed.) 488; *Railway Co. v. O'Keefe, Adm'x*, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68; *Udell v. St. Ry. Co.*, 152 Ind. 507, 52 N. E. 799, 11 Am. St. Rep. 336; 3 *Thompson on Negligence*, §§ 2633 to 2670; 4 *Elliott on Railroads*, §§ 1578 to 1581; *Railway v. Bates*, 149 Ala. 487, 43 South. 98; *Railroad Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254; 9 *Am. & Eng. Ann. Cas.* 1096; *Railroad Co. v. Brooks*, 81 Ill. 245, 250; *Railroad Co. v. Hirst*, 30 Fla. 1, 11 South. 510, 511, 16 L. R. A. 631, 32 Am. St. Rep. 17; *Glenn v. Railroad Co.*, 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255, 6 *Am. & Eng. Ann. Cas.* 1032; *Heinlein v. Railroad Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Railway Co. v. Beecher*, 65 Ark. 64, 44 S. W. 715; *Railway Co. v. Harz*, 88 Miss. 681, 42 South. 201; *Andrews v. Railway Co.*, 86 Miss. 129, 38 South. 773; *Barmore v. Railway Co.*, 85 Miss. 426, 38 South. 210, 70 L. R. A. 627; *Canton Co. v. Pool*, 78 Miss. 147, 28 South. 823, 84 Am. St. Rep. 620; *Railroad Co. v. Anderson*, 77 Miss. 28, 25 South. 865; *Rail-*

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road Co. v. Latham, 72 Miss. 32, 16 South. 757; Railroad Co. v. McAfee, 71 Miss. 70, 14 South. 260; Railroad Co. v. Baird, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43; Turley v. Railroad Co., 70 N. H. 348, 47 Atl. 261; Railroad Co. v. Mason, 137 Ala. 342, 34 South. 207.

Leftwich & Tubb, for appellees, cite:

3 Thompson on Negligence, §§ 2635 to 2640; Creed v. Pa. Ry. Co., 86 Pa. 139, 27 Am. Rep. 693; Note to Railway v. O'Keefe, 61 Am. St. Rep. 78, and cases cited; Note to Perkins v. Railway Co., 82 Am. Dec. 293, and cases cited; 4 Elliott on Railways, § 1578; 3 Thompson on Negligence, § 2675; Railway v. Books, 57 Pa. 339, 98 Am. Dec. 229; 6 Cyc. 536-539; 3 Thompson on Negligence, § 2638; 4 Elliott on Railroads, § 1579; 2 Wood's Ry. Law, § 1037; Webster v. Fitchburg Ry. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Railroad v. Beardsley, 79 Miss. 417, 30 South. 660, 89 Am. St. Rep. 660; Hurt v. Railroad Co., 40 Miss. 391; 3 Thompson on Negligence, §§ 2634-2642, 2647; Arnold v. Railway Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542; Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Gardner v. Waycross, 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435; Shearman & Redfield on Negligence, § 262, p. 305; Johnson v. Railway Co., 94 Miss. 447, 47 South. 785, 22 L. R. A. (N. S.) 312; Dougherty v. Railway Co., 84 Miss. 502, 36 South. 699; Railway Co. v. Byrd, 89 Miss. 308, 42 South. 286; Railway v. Jung, 161 Ala. 461, 49 South. 434; Railroad v. Burt, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95; Bush Case, 122 Ala. 470, 26 South. 168; Com. v. Railway Co., 129 Mass. 500, 37 Am. Rep. 382; Warren v. Railway Co., 8 Allen (Mass.) 227, 85 Am. Dec. 700; 4 Elliott on R. R. § 1578; 3 Thompson on Negligence, 2642-2646.

WHITFIELD, C. On the trial of this case, which was an action against the St. Louis & San Francisco Railroad Company and T. P. Willis, the conductor, the jury returned a verdict in favor of the plaintiffs against the railroad company for \$10,000 damages. But the verdict was silent as to the codefendant, Willis, the conductor. We think, on the authorities, that this amounted to a verdict exonerating Willis, to the same extent as if they had found a verdict for Willis. After the verdict, Willis made a motion, based on this theory, and the court sustained the motion, and entered a judgment discharging Willis from liability. The cross-appeal is prosecuted from this. We think the action of the court was correct on the matter involved in the cross-appeal.

The defendant company later made a motion in arrest of the judgment against it. The railroad company presents four defenses: First, that the firing of the pistol by the conductor,

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Willis, and the killing of the deceased, Sanderson, the husband and father of the plaintiffs, was an accident pure and simple, and hence that the company was not liable; second, that the firing of the pistol and the killing of the deceased by the conductor, Willis, if intentional, was a thing not done in the line of his duty while engaged in the service of his master, and hence, being a thing outside the scope of his employment, and not in the line of his duty, the company was not liable; third, that the deceased was not a passenger, and hence the company was not liable; and, fourth, that the verdict and judgment exonerating Willis, the conductor, necessarily operated logically as an exoneration also of the master, and that the verdict for Willis and against the company was an inconsistent, irregular, and illogical verdict, and that the motion in arrest of the judgment, therefore, should have been sustained.

As to the first, the verdict of the jury must be taken as having established the fact that the act was not accidental.

[1] As to the third defense, that the deceased was not a passenger, we think, also, that the evidence as to whether he was a passenger, under all the peculiar circumstances of this particular case as shown by the evidence, was a question of fact for the jury to determine, on proper instructions from the court. The defendant company got the benefit of instructions which told them in varying forms that if they believed from the evidence that the deceased was concealing himself so as to evade the payment of his fare, that he did not have the bona fide intention when he boarded the train of paying his fare, but was stealing a ride and attempting to evade his fare, they should find for the defendant company. Under these full instructions on the testimony in the case, the time of the ride being only about five minutes, we think the fact that he was a passenger was properly submitted to the jury for their determination, and that the verdict consequently establishes the fact that he was a passenger. The authorities on this subject have been admirably collected by the counsel on both sides, whose briefs are able and exhaustive, and we refer to them without further comment.

[2] As to the second proposition, if it should be conceded that the act was not one in the line of the conductor's duty, but was one wholly outside of the scope of his employment and the line of his duty, it is thoroughly well settled that this beneficent principle, applicable in proper cases, that the master is not responsible for the acts done by the servant outside the line of his duty, and not in the service of the master, has no application whatever to a case where the conductor, the alter ego of the company, himself inflicts the injury on the passenger. In *Thompson on Negligence*, vol. 3, § 3187, it is said: "This calls up a plain distinction between the liability of a

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carrier of passengers for assaults or insults committed by his own servants upon his passengers and for similar wrongs committed by them upon trespassers or third persons. For such wrongs committed upon his passengers he will be liable in any event, whether in doing them his servant was acting within the scope of his employment or not, since they are a breach of his contract to carry his passenger in safety and with good treatment." And in a masterly opinion by McClellan, C. J. Birmingham Ry. & Electric Co. v. Baird, reported in 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, this doctrine is elaborately discussed and thoroughly vindicated, citing and reviewing a large number of authorities. Judge McClellan, speaking for the Supreme Court of Alabama in that case, says: "And it is of no consequence, when the wrong is committed by the carrier's own servant, even that servant particularly charged with the duty of conserving the passenger's wellbeing, en route, that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all duty, and apart and away from the scope of employment, as that term is understood in the class of cases first above referred to. The carrier is liable in such cases, because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice toward the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine on principle, and while, as indicated above, there are adjudications against it, the great weight of authority supports it."

He quotes in that opinion the following from Chief Justice Ryan in the case of Craker v. Chicago Railroad Company, 36 Wis. 657, 17 Am. Rep. 504: "But we need not pursue the subject; for, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or willful in the negligence or in the malice of the agent, the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the

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duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in the performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it." And he also quotes the following from Elliott on Railroads: "There is much apparent conflict among the authorities upon this subject; but we think some of it is due to the use of the term 'scope of employment,' or 'line or duty,' in a different sense in different cases, or to a failure to place the decision on the correct ground. It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the willful act of an employee or not. * * * Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take the risk, and to hold it responsible." 4 Elliott on Railroads, § 1638.

We approve this as the true rule in this character of cases. The supreme and paramount duty of the conductor, who is the master in such cases, is to protect the passengers from injury, and the absolute character of this duty excludes entirely the operation of the other principle, applicable in proper cases, that the master is not liable for the servant's act, where that act is clearly not in the line of his duty and done outside the scope of his employment. It seems to us a perfectly sound rule, founded in the highest and most beneficent public policy.

[3] The only remaining defense is the technical one, founded in the rules of pleading and practice, to wit, that the verdict and judgment exonerating the conductor necessarily and logically resulted inevitably in the exoneration also of the master. The reasoning is that the master can only be responsible, in a case like this, because the servant is, on the doctrine of respondeat superior. It is said with great ingenuity and ability that the master can only be derivatively liable; that is, he is liable, if at all, only because of the act of the servant, when that act makes the servant liable, and a verdict, as in this case, for the con-

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ductor, and against the defendant, is inconsistent, irregular, and illogical. The Texas Supreme Court, in *Railway Company v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743, which was a case exactly like this, admitted that the verdict was apparently inconsistent, yet nevertheless said it presented no ground on that account for a reversal of a judgment against the company.

In the case of *Railroad Company v. Clarke*, 85 Miss. 697, 38 South. 97, this court followed the Texas Supreme Court, and rested its judgment on two grounds: First, that if it were assumed in such case that the company and its servant were jointly liable, nevertheless the right of action which the plaintiff had was both joint and several, and that, though both were equally liable, the liability was based on distinct and different legal principles—the servant because of his personal trespass, and the company because of its failure to discharge its nondelegable duty towards the public regarding its custody and management of its dangerous instrumentalities, or, as here, in not having a competent conductor. And the court rests its judgment in the second place on our statute (section 4944 of the Code of 1906; section 4378 of the Code of 1892), which is in the following words: "In all cases, civil and criminal, a judgment or decree appealed from may be affirmed as to some of the appellants and be reversed as to others; and one of several appellants shall not be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights in the case. And when a judgment or decree shall be affirmed as to some of the appellants and be reversed as to others, the case shall thereafter be proceeded with, so far as necessary, as if separate suits had been begun and prosecuted; and execution of the judgment of affirmance may be had accordingly. Costs may be adjudged in such cases as the Supreme Court shall deem proper." This statute was construed in the case of *Weis v. Aaron*, 75 Miss. 138, 21 South. 763, 65 Am. St. Rep. 594. We there said: "When the action of the court below results in merely reversible error as to one of the parties, the other cannot assign here that error."

We think this statute, with this construction placed upon it, is a perfect answer to the argument of learned counsel for appellant on the motion in arrest of judgment. The error assigned by the railroad company, that the verdict exonerating Willis, the conductor, was wrong, at the same time a verdict against the company was rendered, under our statute, and the construction referred to here is at most merely a reversible error as to Willis, not affecting the validity of the judgment against the railroad company. Besides all of which, it is further to be said that we have recently reviewed, on full consideration, the case of *Clarke v. Railroad*, in the case of *Nelson v. I. C.*

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R. R. Co., 53 South. 619, and approved and reaffirmed the doctrine of the Clarke Case on this point, and we remain satisfied of the correctness of our conclusion on the grounds indicated. There are cases to the contrary, which are pointed out by the learned counsel for appellant; but those cases were decided in the absence, so far as they show, of any statute like ours on this subject. Our statute was manifestly intended to do away with the opposite rule, as one which would in many cases sacrifice the substantial rights of parties to a mere rule of procedure, founded on too refined a basis for the practical administration of justice. In the case of *Sellards v. Zomes*, 5 Bush (Ky.) 90, cited in *Louisville Mail Company v. Barnes*, 117 Ky. 860, 79 S. W. 261, 64 L. R. A. 574, 111 Am. St. Rep. 273, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong."

Consequently since our statute of 1836, authorizing several judgments, and dismissal or release of one or more who are sued, cannot per se release the others. This construction of the Kentucky statute is exactly our construction of our statute. See, also, the elaborate notes to *Louisville Mail Company v. Barnes*, supra, and the note to *Abb v. Northern Pacific Railway Company*, 92 Am. St. Rep. 872. And see the opinion of this court in *Bailey v. Delta Electric Company*, 86 Miss. 634, 38 South. 354, where, in concluding the opinion, it was said: "This is more in accord with justice and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reason."

PER CURIAM. The above opinion is adopted as the opinion of the court, and for the reasons therein indicated the judgment of the court below is affirmed, both on the appeal and cross-appeal.

VERLINDE *v.* MICHIGAN CENT. R. CO.

(Supreme Court of Michigan, March 13, 1911.)

[130 N. W. Rep. 317.]

Action—Joinder of Causes of Action—Wrongful Death—Loss of Services.—A father suing for wrongful death of his son may not combine in one count a claim for loss of the son's services with his claim as administrator under the survival act, and recover for both in the same action.

Action—Misjoinder of Causes.—A father suing as administrator for wrongful death of his son may not combine in one count a claim under the "Death Act" and a claim under the "Survival Act," and recover both classes of damages.

Parent and Child—Loss of Services—Damages—Measure.*—Independent of statute, a father whose son was negligently killed could only recover for loss of services accruing between the injury and the death.

Railroads—Trespassers on Cars—Duty of Railroad.†—A railroad owes to trespassers on its cars the duty of using ordinary care to prevent injury arising from active negligence.

Railroads—Injuries to Trespassers on Cars—Negligence—Jury Questions.‡—Whether defendant railroad's brakeman was guilty of active negligence in ordering in a threatening manner decedent and another, young boys, riding on a flat car of a moving train on a side track near a main track on which another train was approaching, to "get to hell out of here," held, under the evidence, for the jury.

Railroads—Ejection of Trespassers on Trains—Authority of Brakeman.§—Where a railroad's rules required employees to render every

*For the authorities in this series on the question whether damages can be recovered at common law, for the wrongful death of a person, see foot-note of *Harshman v. Northern Pac. Ry. Co.* (N. Dak.), 19 R. R. R. 515, 42 Am. & Eng. R. Cas., N. S., 515; *Baltimore & O. R. Co. v. Chambers* (Ohio), 18 R. R. R. 766, 41 Am. & Eng. R. Cas., N. S., 766.

†For the authorities in this series on the subject of the degree of care due trespassers on trains or cars, see foot-note of *Broyles v. Central of Georgia Ry. Co.* (Ala.), 36 R. R. R. 155, 59 Am. & Eng. R. Cas., N. S., 155; foot-note of *Yancy v. Boston Elev. Ry. Co.* (Mass.), 35 R. R. R. 705, 58 Am. & Eng. R. Cas., N. S., 705; fourth head-note of *Welch v. Boston* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35.

‡For the authorities in this series on the subject of the liability of railroad companies on account of the ejection of trespassers from moving trains, see foot-note of *Williams v. Louisiana Ry. & Nav. Co.* (La.), 30 R. R. R. 240, 53 Am. & Eng. R. Cas., N. S., 240.

§For the authorities in this series on the question whether it is within the scope of a servant's employment to eject trespassers from trains or cars, see foot-note of *Drolshagen v. Union Depot R. Co.* (Mo.), 18 R. R. R. 223, 41 Am. & Eng. R. Cas., N. S., 223, where all those preceding it are collected.

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assistance in their power in carrying out the rules and special instructions, among which special instructions to freight conductors was one that tramps or other persons, without legitimate business on trains, must not be allowed to ride, and that every precaution must be taken to prevent cars being robbed while in transit, a freight brakeman had implied authority to order trespassers off the cars.

Railroads—Ejection of Trespassers—Evidence.§—Where railroad's rules made trainmen while on trains subject to the conductor's orders, evidence that it was the custom of brakemen to eject trespassers would not prove authority so to do, unless it also appeared that such acts were not pursuant to the authority of the conductor.

Railroads—Injury to Trespassers on Cars—Proximate Cause—Jury Questions.—Whether the alleged negligence of defendant railroad's brakeman in ordering in a threatening manner decedent and another boy from a flat car, so that they jumped and were run over by another train, was the proximate cause of the injury, held, under the evidence, for the jury.

Error to Circuit Court, Otsego County; Nelson Sharpe, Judge.

Action by Charles Verlinde, administrator, against the Michigan Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ.

George L. Alexander (Humphrey, Grant & Baker, of counsel), for appellant.

W. L. Townsend (De Vere Hall, of counsel), for appellee.

BLAIR, J. Plaintiff brings this action as administrator of the estate of his son, Peter Verlinde, to recover damages for his death, alleged to have been caused by the negligence of defendant. Immediately prior to his injury, Peter, then 13 years of age, and an older boy, were unlawfully riding upon defendant's train of flat cars, which was moving north on a side track at the rate of four or five miles an hour. When first seen, the boys were lying side by side about in the center of a flat car, flat on their stomachs, with their heads sticking up and facing north. It was the intention of the boys to ride a short distance, and then jump off. A brakeman stood upon a flat car three or four cars south of the one the boys were on, talking with a man who intended to ride to the highway crossing and then jump off. When the brakeman saw the boys, he said, "he would have to put them off the train, that he couldn't let them ride," and started towards them. At the same time a locomotive was pushing a car of bark south on the main track to put into a freight train on such track, which

§See foot-note on preceding page.

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was a few feet east of, and parallel with, the side track. The conductor of the train on the main track stood near the high-way crossing. When the boys were within about half a car length, the conductor called to them that the brakeman was coming. When the conductor spoke, they turned their heads and saw the brakeman coming, who told them to "get to hell out of here." The Ward boy raised up first, and, as he raised up, the Verlinde boy raised, and the Ward boy took the Verlinde boy by the shoulder, and they both leaped at once. At the time they jumped, the car of bark was only a few feet distant. They fell as they struck the ground, and were run over. Peter lived an hour and a half or two hours after his injuries. The boys might have jumped off on the west side with comparative safety.

The declaration contains only one count, and avers the right of the father and mother to recover damages for pecuniary loss and injury, and the deprivation "of the value of the services, assistance, aid, comfort, society, and prospective earnings of intestate until he would have arrived at the age of 21 years," to the amount of \$5,000, and, also, that intestate would after becoming 21 years old have earned \$40 a month, and, in consequence of his injuries he suffered great pain, and his estate has suffered a loss thereby through pain and suffering and what he would have earned after he became 21 years old during his expectancy of life, for which a right of action to recover \$10,000 has accrued to his administrator. Defendant pleaded the general issue. At the beginning of the testimony, defendant's counsel objected to the reception of any testimony, for the reason that there was a misjoinder of causes of action in one count. The objection was overruled and exception taken. Later in the course of the trial, the following paper, executed by the parents, was received in evidence against the objection and exception of counsel for defendant: "We, the parents of Peter Verlinde, formerly of Waters, Michigan, now deceased, hereby severally surrender to the estate of said Peter Verlinde, all right of action for damages for the injuries sustained by him and his consequent death, on June 20, 1908, through the claimed negligence of the Michigan Central Railroad Company, and all loss of earnings and earning capacity during his minority, which otherwise would have existed in us, or either of us, hereby granting such rights and claims to the said estate and severally releasing such company from all such rights and claims upon our several parts. Dated, Gaylord, Michigan, February 28, 1910. Charles Verlinde. Mary Verlinde." Certain rules of the defendant and the deposition of a witness as to the custom of brakemen in ejecting trespassers were put in evidence. At the close of plaintiff's testimony, a motion was made for a directed verdict, which was overruled, and the case was

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submitted to the jury, with instructions that, if they found that the plaintiff was entitled to recover, he was entitled to both classes of damages claimed in the declaration. Plaintiff had verdict and judgment, and defendant brings the record to this court for review upon writ of error.

We are of the opinion that the defendant's objections to the declaration and charge based thereon are well founded. The plaintiff could not combine in one count a claim for loss of his son's services with his claim as administrator under the survival act and recover for both in the same action. *Walker v. Traction Co.*, 144 Mich. 685, 108 N. W. 90; *Id.*, 156 Mich. 514, 121 N. W. 271; *Fournier v. D. U. R.*, 157 Mich. 589, 122 N. W. 299. Neither could the administrator combine in one count a claim under the death act, so called, and a claim under the survival act and recover both classes of damages. *Dolson v. Railway Co.*, 128 Mich. 444, 87 N. W. 629; *Carbary v. D. U. R.*, 157 Mich. 683, 122 N. W. 367. Independent of statute, the father could only recover for the loss of services accruing between the injury and the death. *Hyatt v. Adams*, 16 Mich. 180; *Merkle v. Bennington*, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666. No cause of action survived for loss of services which belonged to the father. *Walker v. Traction Company*, 156 Mich. 514, 121 N. W. 271. And the father could not confer upon the administrator a cause of action for loss of services subsequent to death which he himself did not possess. This objection can be obviated by amendment to the declaration.

It is further urged that there was no evidence that the brakeman had any authority to eject trespassers, and the act complained of was not within the scope of his employment, citing *Randall v. Railway Co.*, 113 Mich. 115, 71 N. W. 450, 38 L. R. A. 666; *Hartigan v. Railway Co.*, 113 Mich. 122, 71 N. W. 452. The defendant owed a duty to the boys "to use ordinary care to prevent injury to them arising from active negligence." *Schmidt v. Coal Co.*, 159 Mich. 308, 123 N. W. 1122. We cannot say as a matter of law that it was not active negligence to order the boys in a fierce and threatening manner to "get to hell out of here," in view of the surrounding circumstances. The important question is therefore, whether the brakeman was acting within the scope of his employment. The brakeman evidently understood that it was his duty to put the boys off, and supposed that he was acting within the scope of his employment in ordering them off, since he said to the witness Norman that "he would have to put them off the train, that he couldn't let them ride." Apparently the conductor of the other train entertained the same view of the brakeman's authority and duty, since he warned the boys of his approach. While the statement of the brakeman would not be evidence

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of express authority conferred upon him, it would be evidence that the act was done with a view to further the employer's interests, and not from a personal motive on the part of the brakeman to do the act on his own account.

The rules of the defendant printed in this record do not expressly, nor, in my opinion, impliedly, negative the authority of the brakeman to order trespassers off a train. Several of the rules printed in this record do not appear in the record in the Hartigan Case, and the brakeman's want of authority in that case was predicated upon the testimony of the general superintendent of the road. The rules printed in this record appear to me to imply, at least so far as ordering trespassers off the train, such authority upon the part of the brakeman. I quote the following:

"(B) Employees must be conversant with and obey the rules and special instructions. While the special rules are subdivided for convenience, they apply equally to all, and must be observed wherever they relate in any way to the proper discharge of the duties of any employee. If in doubt as to their meaning, they must apply at once to the division superintendent, assistant superintendent or train-master for an explanation."

"(D) Persons employed in any service on trains are subject to the rules and special instructions.

"(E) Employees must render every assistance in their power in carrying out the rules and special instructions. * * *

"900. Trainmen report to and receive their instructions from the trainmaster, and while on trains are subject to the orders of the conductor, and at terminal stations must obey the orders of the stationmaster or agent. They must be governed by the rules for conductors in so far as the rules pertain to their duties."

"920. Brakemen report to and receive their instructions from the trainmaster, and while on trains, are subject to the orders of the conductor, and at divisional stations they must obey the orders of the agent or yardmaster. They must be governed by the rules for conductors, in so far as the rules pertain to their duties."

"Freight Conductors. Special Instructions.

"830. Passengers, including employees not on duty, must not be carried on freight trains without proper authority.

"831. Tramps or other persons who have no legitimate business on the trains must not be allowed to ride. Every precaution must be taken to prevent cars being robbed while in transit."

"920. (Same as above.)"

It is made the duty of the brakeman to render every assistance in his power "in carrying out the rules and special instructions," and among such special instructions to freight con-

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ductors is the one quoted, that "tramps or other persons who have no legitimate business on the trains must not be allowed to ride." No discretion is permitted to the conductor as to whether a trespasser shall be permitted to ride. They must not be allowed to ride at all. If the brakeman reports to the conductor that a trespasser is on the train, the conductor must either put him off himself, in which event the brakeman is bound to assist him, or he must order the brakeman to put him off. Section 6287, Comp. Laws, provides that: "If any person shall refuse to pay his fare or refuse to obey such regulations as may be established for the convenience and safety of passengers, it shall be lawful for the conductor of the train and servants of the company to put him off the train at any usual stopping place, or opposite any dwelling house, the conductor may select." This statute applies only to passenger trains, and apparently rule 815 printed in the record, applying only to trains carrying passengers, is in pursuance of the statute, and should be interpreted as authorizing "the conductor of the train and servants of the company" to eject a person not entitled to ride. The only limitation upon the authority of the servants is that the conductor is to select the place where the trespasser is to be put off if it is not a "usual stopping place." Again, rule 831 indicates that part of the reason for the rule is the prevention of robbery of the cars, which it would clearly be the duty of the brakemen to prevent, and, under Rule B, applies equally to, and must be observed by, the brakemen.

I am further of the opinion that, even though it should be held that the brakeman had no authority to actually eject a trespasser from the train, still, under rule E, it would be his duty to prevent violations of special instruction 831 by ordering trespassers to get off whenever and wherever the conductor would be justified in doing so. Whether the brakeman was negligent in the discharge of his duty was a question of fact for the jury. If he was negligent, the defendant was responsible for its result. There was also some testimony that it was the custom of brakemen to eject trespassers, but such testimony would not suffice to prove authority unless it also appeared that such acts were not pursuant to the authority of the conductor, and the special instances mentioned by the witness were in pursuance of such authority or of the trainmaster.

It is also contended that the alleged negligence of the brakeman was not the proximate cause of the injury; that it was not the order of the brakeman that caused the boys to jump to the east rather than to the west; that the act of jumping caused them no injury whatever, and was not the proximate cause of the injury. "The proximate cause of the injury was their being run over by a train coming from another direction,

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and which was being moved in a proper and ordinary way," etc. This question is to be determined in the light of the situation at the time the brakeman gave the order, the character of the order, and the manner of the brakeman. The brakeman was walking directly towards the approaching car of bark, and the jury might well infer that he saw it, and that he heard what the conductor said, since the man talking with him heard it. It was a question of fact for the jury whether a reasonably prudent man ought not to have anticipated that the boys would be so frightened and startled as to lose their self-control and jump at once to escape the immediately threatening danger without regard to other dangers.

For the error above referred to, the judgment is reversed, and a new trial ordered.

NILAND *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, April 4, 1911.)

[94 N. E. Rep. 703.]

Carriers—Street Railroads—Collisions—Injury to Passengers—Liability.*—A street railway company is not liable for injury to a passenger in a collision between the car and an ice wagon, caused by a sudden movement of the horses attached to the wagon, if the car was not running at an excessive speed, but is liable if the car struck the wagon while it was stationary.

Trial—Submission of Issues.—Generally a case should go to the jury if there is evidence proper for their consideration, though the preponderance seem so great to the trial court as to require him to set aside an adverse verdict.

Exceptions from Superior Court, Suffolk County; Edward P. Pierce, Judge.

Action by John Niland against the Boston Elevated Railway Company. Verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

Jos. L. Keogh, for plaintiff.

Russell A. Sears and *Charles S. French*, for defendant.

RUGG, J. [1] There was evidence tending to show that the

*For the authorities in this series on the subject of the liabilities of carriers for injuries to passenger from collisions with objects or structures near tracks, see last paragraph of foot-note of *Southern Ry. Co. v. Nichols* (Ga.), 37 R. R. R. 767, 60 Am. & Eng. R. Cas., N. S., 767; second foot-note of *Gardner v. Metropolitan St. R. Co.* (Mo.), 36 R. R. R. 448, 59 Am. & Eng. R. Cas., N. S., 448.

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plaintiff while a passenger upon one of defendant's surface cars was injured by its sudden stopping incident to a collision with an ice wagon, left unattended in the street. There was ample evidence to support a finding that the accident occurred through the sudden movement of the horses attached to the ice wagon which brought one of them without warning upon the track in front of the car, and that the motorman then quickly stopped his car, which was not going at an excessive rate of speed. If these were the facts, the defendant would not be liable. *Timms v. Old Colony St. Ry. Co.*, 183 Mass. 193, 66 N. E. 797; *Byron v. Lynn & Boston Railroad*, 177 Mass. 303, 58 N. E. 1015.

But the plaintiff testified that the track was straight for a considerable distance, that "the ice wagon was not going" and that the car struck "some part of the ice wagon." So far as the printed record goes, this seems to warrant a finding that the plaintiff was injured by the car running into a wagon stationary upon the track. It requires no discussion to show that this might be found to constitute a violation of that high degree of care which the defendant owed to the plaintiff as its passenger.

The case, therefore, should have been submitted to the jury. If in the opinion of the superior court the weight of the evidence was so strongly against the plaintiff as not to warrant a verdict in his favor, and the jury should make the mistake of returning such a verdict, the injustice could be corrected by setting it aside on motion. [2] The practice in this commonwealth and generally requires a submission to the jury if there is evidence proper for their consideration, even though the preponderance may appear so great to the trial court as to require him (if requested) to set aside one or several verdicts rendered against such preponderance. *White v. Boston*, 122 Mass. 491; *Bryant v. Com. Ins. Co.*, 13 Pick. 543; *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974, and cases cited; *Aiken v. Holyoke St. Ry.*, 180 Mass. 9-12, 61 N. E. 557; *Lurton, J.*, in *Mt. Adams & E. P. Inclined Ry. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596-609; *Taft, J.*, in *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321-327.

Exceptions sustained.

DOHERTY *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Montana, May 1, 1911.)

[115 Pac. Rep. 401.]

Carriers—Passengers—Right to Carriage.*—The right of a railway passenger who purchased a first-class ticket and entered a train apparently ready to receive passengers to carriage to his destination is subject to observance of all reasonable rules adopted by the carrier, including the requirement of payment of Pullman car fare; the train being composed of sleepers only, though he have no notice of such rules.

Carriers—Passengers—Right to Expel.—A railway company can expel a passenger from a car in which are provided accommodations for which he has not paid, if it is done without unnecessary force.

Carriers—Passengers—Regulations—Separate Accommodations.—When the traffic demands it, a railway company may run trains composed exclusively of sleepers, and exclude or remove therefrom all persons who have not provided themselves with berths or seats under reasonable regulations, if provision to accommodate the public by other trains running at reasonable intervals has been made.

Carriers—Passengers—Regulations—Reasonableness—Determination.—The reasonableness of a railway company's regulation restricting the right of passengers to carriage on certain trains is for the court.

Carriers—Passengers—Regulations—Reasonableness.*—A railway company rule governing trains composed exclusively of sleepers requiring passengers boarding a train before 7 o'clock a. m. to pay a sleeping berth rate is not unreasonable.

Carriers—Passengers—Ejection—Right to Recover.—A passenger ejected from a Pullman train for refusal to pay a full berth rate cannot recover on account of the porter's mistake in excluding from the train a fellow passenger who might have shared the berth and the charge therefor; the ejected passenger having relied on unreasonableness of the rule, and not on the misinformation given by the porter.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by E. J. Doherty against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

*For the authorities in this series on the question of the validity of a carrier of passenger's rules and regulations, see foot-note of Knoxville Traction Co. *v.* Wilkerson (Tenn.), 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763; first foot-note of Kirk *v.* Seattle Elect. Co. (Wash.), 37 R. R. R. 493, 60 Am. & Eng. R. Cas., N. S., 493.

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Maury & Templeman and *J. O. Davies*, for appellant.
R. F. Gaines, John G. Brown, and Wm. Wallace, Jr., for respondent.

BRANTLY, C. J. Plaintiff brought this action to recover damages for a wrongful expulsion from one of defendant's trains. The complaint alleges that on July 26, 1909, the plaintiff purchased from the defendant at Butte, Mont., a ticket from that place to Missoula, Mont.; that he entered one of defendant's passenger trains, delivered the ticket to the conductor in charge, and was riding as a passenger on his way to Missoula; and that, before he reached his destination, the defendant, acting through its conductor, at Warm Springs station, without right and with force and violence and against plaintiff's will, with circumstances of indignity and by kicking or striking plaintiff with his knee, ejected him from the train, to his damage, etc. The answer admits the purchase of the ticket by plaintiff; that he entered upon the train as alleged; that he offered the ticket to the conductor; and that he was ejected from the train at Warm Springs, and denies all the other allegations of the complaint. It then alleges affirmatively that the expulsion of plaintiff was due to his own fault; that he entered a train consisting wholly of Pullman cars; that in order to ride thereon, in addition to the purchase of a regular first-class ticket, it was necessary to pay Pullman car fare; that, upon being advised by the conductor that his ticket could not be accepted unless he paid the Pullman fare, he refused to pay it, and that because of such refusal the defendant was forced to stop its train and expel him therefrom. Upon these allegations there was issue by reply. At the trial, the hearing of the evidence being completed, the court sustained defendant's motion for a verdict in its favor. The appeal is from the judgment entered thereon.

The grounds of defendant's motion are that the complaint fails in several particulars to state a cause of action, and that the evidence is insufficient to make a case for the jury. For the purposes of this decision, we shall assume that the complaint states a cause of action, and consider only the question whether the action of the court in directing a verdict was correct. Plaintiff does not now claim that upon his expulsion from the train he was subjected to maltreatment of any kind. His contention is that the wrong done him was the violation by the defendant of his right to continue his passage after it was begun by requiring him to leave the train. We shall also therefore eliminate consideration of the evidence showing the manner of plaintiff's expulsion, and examine that only upon which he bases his contention that the court erred in directing a verdict for the defendant. The evidence shows the following: On July 26, 1909, the plaintiff and others purchased from defendant at Butte first-class tickets from that place to Missoula intending to take de-

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fendant's train known as No. 15. This train was divided into two sections. The first was made up exclusively of Pullman sleeping cars. The day coaches were in the second section. The two sections were scheduled as one train. The first section arrived at Butte about 6 o'clock, some two hours and a half after daylight, and left a few minutes later. The second section usually followed after an interval of 25 minutes. On this morning it followed 30 or 40 minutes later. When the first section arrived, the plaintiff, with six or seven others bound to the same destination, sought to enter it. A porter employed on the train, standing at the entrance of the car, told them that there was room for five more passengers only, and would not permit more than five to enter, though others attempted to do so. Among the five was plaintiff. The other four were strangers to him, and it seems had not met each other before that morning. When the conductor came to collect their Pullman fares, the following took place:

Plaintiff testified: "The Pullman car conductor came along and says: 'Do you gentlemen want this drawing room?' And one of the gentlemen spoke up and says: 'How much is it?' He says: 'Six dollars.' He says, 'Haven't you got some other place to sit besides here? That's pretty steep.' He says: 'I can give you berths. A dollar and a half for two.' He says: 'That will be six bits a piece?' He says: 'Yes.' He went away and after a while he came back, and says: 'If you want berths, dig up.' They started to give him six bits a piece. He took it and came to me, and he wanted a dollar and a half from me. I says: 'What do you want a dollar and a half from me for?' He says: 'Because you haven't got anybody with you.' I says: 'I will pay six bits, like the other gentlemen, but I won't pay a dollar and a half.' He says: 'You will pay a dollar and a half or get off.' I says: 'You took six bits from four different men in front of me, and you want me to pay as much as two of them.' He says: 'Well, you'll get off at the next station.' So the conductor came along and took up the tickets, and he told the conductor: 'This fellow won't pay for a berth.' So the conductor took and punched my ticket and marked it, with an indelible pencil, 'R25' or '26,' I don't know which. So, when we got along towards Warm Springs, he flagged the train. There were three of us sitting in a seat together. I was the last one of the three. The conductor asked me if I would pay a dollar and a half. I said: 'No; but I will pay six bits.' So he reached over and grabbed hold of me, and dragged me out of the seat, and started me ahead of him along through the aisle, or whatever you call it, and pushed me out onto the platform, and they had the vestibule open. I placed my hands against the side of the car, like that [illustrating], and he started pushing me down, and he pushed me off anyway, and I won't say

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whether he kicked me with his foot or gave me a punch with his knee, but he got me in the ribs, anyway, and put me off the train. It was a good stiff jolt in the ribs. When I speak of 'six bits,' that is the ordinary common-place expression for 75 cents. * * * The Pullman conductor first asked if our party, consisting of we men in there, wanted the drawing room; and he was then asked by some one of the party how much it was, and stated, 'Six dollars.' Then he was told that that seemed rather high, and couldn't he give them some other accommodation. The train pulled out of here about five minutes after 6 or at 6 o'clock in the morning—close to 6, probably a little after. The curtains were down on some of the berths, but there was two or three seats probably in the center of the car that was open. Then the conductor said he could sell a berth for a dollar and a half for two. He said, 'Six bits apiece.' As to whether he said that or some of the men said that would be six bits apiece, they asked him if that would be six bits apiece, and he said, 'Yes.' His statement was that he could sell a berth for a dollar and a half. * * * He never said no such thing as that the party could pair off as they wanted to. He didn't say that. I apparently was the last person to collect from. The others paid six bits apiece. He collected six bits apiece from four men. He then had pay for two berths. Then he told me that I would have to pay a dollar and a half. He told me that was the price of the berths. I insisted that I should be carried for the price that each of the other men had paid. That was the controversy between us. I said I would pay six bits, just the same as the others, and he told me that I would have to pay the price of a berth. He didn't go and get the train conductor then. The train conductor come along. He never left there. The train conductor arrived. Down to that time, I had had my train ticket—my passage ticket. I gave the passage ticket to the train conductor—offered it to him. The Pullman car conductor said: 'This fellow won't pay a dollar and a half for a berth.' The train conductor asked him if he wanted me put off. He said, 'Yes,' if I didn't pay a dollar and a half. I told the train conductor I would only pay 75 cents, what each of the other men had paid. That was the actual difference between us. * * * I just sat there, and he reached over and pulled me out. When he said, 'Come on, get out of here,' I sat there. I didn't intend to go voluntarily. I sat there after he told me to, 'Come, get off,' until he took two steps to put me off; and I meant to 'put it up to him' to put me off the train, if I was to be put off. That was my purpose. I stepped down on the steps of the platform when he pushed me. When I got out on the car platform, he asked the Pullman car conductor that was down below, 'Do you want this man put off?' The Pullman car conductor was standing on the

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ground, and the railroad conductor says, 'Do you want this man put off?' He says, 'Yes; unless he pays a dollar and a half.' I says, 'I won't pay a dollar and a half. I will pay six bits like the others.' We were right on the platform. I was maintaining my position, and they were maintaining theirs. The question was whether I should pay 75 cents or a dollar and a half. That was the point in dispute." Plaintiff stated in other portions of his testimony that he knew that he was in a Pullman car and had ridden in such a car often.

Hoyt, the train conductor, called by defendant, testified: "I am familiar as train conductor with the rule of business as it was carried on as to when they exact seat fare and when they exact berth fare. After 7 o'clock in the morning it is seat fare. Anything before that it is berth rate. The berth rate is \$1.50 between Butte and Missoula. When I got into this drawing room, I learned who it was that wouldn't pay the fare by the Pullman conductor showing him to me. I explained to him in regard to the way the fares was collected, and what we would have to do if he wouldn't pay it. I would mark his ticket off at Warm Springs, and he could get the second section with day coaches, which would make a difference of about 40 minutes to Missoula. It was between 30 and 40 minutes behind us, and I told him that. This took place after we were out of Butte about 15 minutes. * * * I told him before 7 o'clock in the morning it was berth rate; and, if there were two men together, the two could stay in the berth and pay the fare between them; but, where there was only one, he had to pay full fare. He said he would pay but 75 cents; that is, what the rest of them paid. He said he had a first-class ticket, and he was going to ride on it. I told him he couldn't ride on a first-class ticket without Pullman transportation. I told him I would mark his ticket, and I did. After so marking the ticket, I canceled it once and handed it back to him, and he accepted it. The train at this time was just coming into Warm Springs."

The witness Baysoar, agent of the defendant at Butte, testified: "I was familiar with the method of selling seats and berths in Pullman cars as they prevailed in the regular course of business in July of last year. They ceased selling tickets at night to any point reached by the train after 10 o'clock p. m. In the regular course of business, the sale of seats in Pullman cars would be resumed at 7 o'clock in the morning of the next day. In that interval between 10 p. m. and 7 a. m., there is nothing in the way of accommodations in Pullmans but berths on sale, aside from the drawing room. We never in the course of business sell half berths. We couldn't do that. Two adults could occupy a berth when a berth was purchased. That is the limit for adults." As an exhibit to his testimony there was intro-

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duced a rule relating to the Pullman car service, which he stated was the only rule of the defendant and the Pullman Company upon the subject. The portion of this rule which is material here is the following: "Ticket agents and conductors must conform strictly to tariff in the sale of accommodations and to the instructions contained herein. (a) Seats in sleeping cars will be sold from stations passed after a reasonable hour in the morning, where such sales will not discommode berth passengers; but will not be sold to stations passed after 10:30 p. m., or before a reasonable time in the morning, except by special orders as to particular lines, or where a car is due to arrive at terminus by midnight. This rule will not apply to observation, composite, library or club cars, in which seats may be sold during the night, when such sales do not interfere with the sleep of a passenger or conflict with the rules of the road over which the cars are running. Seat passengers will not be located in space of berth passengers." It appears, further, that the train conductor by virtue of his general power of control over the train had authority to eject passengers from Pullman cars when they refused to pay their fare or refused to comply in other respects with the rules governing the use of them by passengers, though it does not appear definitely where the defendant was running the Pullman cars on its own account, or was running them by some traffic agreement with the Pullman Company. In any event, it is not questioned that in ejecting plaintiff he was acting within the scope of his employment as the servant of the defendant.

[1] It may be conceded, as counsel for plaintiff contend, that, having purchased a first-class ticket and entered a car apparently ready to receive passengers, plaintiff thereby became a passenger and was thereafter entitled to all the rights and privileges appertaining to his relation to defendant as such, among which was his right to proceed on his journey to his destination (*Elliott on Railroads*, § 1579); but to this concession must be attached the reservation that the continuance of his right was conditioned upon his observance of all reasonable rules adopted by the defendant to govern travel upon the character of train upon which he had assumed to take passage. "A common carrier is entitled to a reasonable compensation, and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry." *Rev. Codes*, § 5337. "A common carrier may demand the fare of passengers either at starting or at any subsequent time." *Section 5349*. Again: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable." *Section 5348*. So, too, where a railroad company has provided ordinary and reasonable facilities for its passen-

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gers, the purchase of a ticket entitling a passenger to carriage over the railroad does not entitle him to travel in a sleeping car without paying additional compensation, even though he may not have notice of the rules of the company. *Elliott on Railroads*, § 1626.

[2] In such case the company is within its rights when it removes the passenger to a car in which are provided the accommodations for which he has not paid, if it is done without unnecessary force.

[3] It seems apparent, also, that, when the demands of business require it, a railroad company may run trains composed exclusively of Pullman sleepers, and exclude or remove therefrom all persons who have not provided themselves with berths or seats, as the case may be, under reasonable regulations, if it has at the same time made provision to accommodate the public by other trains running at reasonable intervals. In such case, it is not incumbent upon the company to bring home to the passenger notice of its rules. The obligation rests upon the person proposing to become a passenger to inform himself when he purchases his ticket as to the mode of travel provided and to conduct himself accordingly. *Ames v. Southern Pac. Ry. Co.*, 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98. By inquiry the plaintiff in this case would have ascertained that a train fully equipped with day coaches was due in a few minutes. Indeed, we are justified by the evidence in assuming that he was informed that the train he entered was composed of sleeping cars, and he must be presumed to have known that an additional fare would be exacted; for he stated that he knew that he was in a Pullman, and had often traveled in such cars. That an additional fare will be exacted in such cases is a matter of common everyday experience and observation.

[4] The integrity of this judgment in this case, therefore, is to be determined by answer to the inquiry: Was the rule in question a reasonable one? The statements of the different witnesses agree in all essential particulars. The facts are not disputed. Therefore the question of the reasonableness of the rule was exclusively one for the court. *Elliott on Railroads*, § 202, and cases cited; *Central of Georgia Ry. Co. v. Motes*, 117 Ga. 923, 43 S. E. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223. The purpose of the rule is apparent. Pullman sleeping cars in ordinary use are intended to, and do, answer two purposes, viz., to furnish to passengers who desire and are willing to pay for them berths for sleeping purposes at night and for superior comfort and convenience and liberty of movement during the day, and to afford to day passengers the same conveniences and comforts which are extended to berth owners during the day. The second purpose is subordinate to the first, since it is incumbent upon the railroad company to require both its

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employees and passengers to observe such rules and regulations as will permit the owners of berths to enjoy both their day and night privileges. It is imperative that they shall not be unreasonably crowded during the day, and that beyond a reasonable hour in the evening, and a reasonable hour in the morning, they shall not be disturbed by the noises incident to the coming and going of seat passengers. It is entirely in accord with common experience and observation that the usual hour for retirement to rest in the evening is not far from that fixed in the rule, after which seats may not be sold, and that the period of 8½ hours, the time set apart for that purpose, is not beyond what is reasonably necessary for the physical health and well-being of the average man. Besides this, such privacy as may be had in the absence of day passengers for preparation to retire and for the morning toilet is, in the opinion of the average person, indispensably necessary.

[5] In view of these considerations, we do not think the rule unreasonable and arbitrary, even though in the month of July in this latitude daylight comes 2½ hours earlier than 7 o'clock in the morning, and even though the plaintiff and his associates did not wish to go to bed. It is not unreasonable that persons situated as were the plaintiff and his companions, though permitted to enter the car, should be subject to the rules incident to night travel, and pay the price fixed for accommodation during the hours set apart for that purpose. To hold otherwise would require railroad companies to lengthen or shorten these hours according to the accidents of the seasons, or to vary them at the whim of individual passengers.

Under the rule as interpreted by the Pullman conductor, half berths could not be sold, but one berth could be sold to two persons. His sale of berths to the four other passengers as he did, allowing each to pay one-half the price, was a compliance with the rule as he interpreted it. It was a question between him and his employer whether he correctly interpreted it. He was clearly within its reasonable requirements in demanding the berth rate from the plaintiff; and the plaintiff had no right to complain that he was not so situated that he could join with some one else in the purchase of his accommodations and obtain them at the same price as the others. But counsel say that defendant is chargeable with putting him in that position, because it is apparent that, if there were accommodations for five persons, there were for six, and but for the action of the porter in charging in excluding other passengers he would have obtained his accommodations at the same price as the others.

[6] Under the cause of action alleged in the complaint, however, we do not think the plaintiff is entitled to recover because of the mistake made by the porter. The conductor in collecting the fares obeyed the rule as he was allowed to interpret it.

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He would not have been justified in modifying the rule in order to accommodate plaintiff. Nor do we think that a porter whose duties ordinarily are those of a domestic servant had the authority to modify it for him. There is nothing in the record tending to show that he had such authority, nor, in so far as we may assume knowledge as to the character of his duties, may we infer that he had such authority. In his controversy with the conductor, the plaintiff did not rely upon the information given him by the porter. He did not claim that the porter misinformed him. His claim was that the rule was unreasonable.

The judgment is affirmed.

Affirmed.

HOLLOWAY, J., concurs.

KLINE v. MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin, May 2, 1911.)

[131 N. W. Rep. 427.]

Carriers—Carriage of Passengers—Acts of Fellow Passengers—Obligation of Conductor.*—A passenger conductor must keep a vigilant supervision over a drunken and quarrelsome passenger to prevent him from injuring or annoying fellow passengers, and to prevent injury or annoyance to fellow passengers he should refuse to further carry such passenger.

Carriers—Carriage of Passengers—Acts of Fellow Passengers—Obligation of Conductor.*—Where a passenger conductor knew of the boisterous and quarrelsome condition of a passenger, but ignored requests from fellow passengers to expel such passenger, and left the fellow passengers to protect themselves, the jury might find that the conductor failed to protect the fellow passengers, rendering the carrier liable for injuries inflicted by such passenger on a fellow passenger.

Carriers—Carriage of Passengers—Acts of Fellow Passengers—Obligation of Conductor.*—To make a carrier liable for injuries inflicted on a passenger by a fellow passenger, it must be shown that the conductor knew, or had opportunity to know, that some injury was threatened or was probable, and that by his prompt intervention he might have prevented or mitigated such injury.

*For the authorities in this series on the subject of the duty of a railroad company to protect its passengers against their fellow passengers, see first foot-note of Penny v. Atlantic C. L. R. Co. (N. C.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535.

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Carriers—Carriage of Passengers—Acts of Fellow Passengers—Obligation of Conductor.—In an action for injuries by a passenger inflicted by a fellow passenger, evidence held to justify a finding that the conductor had knowledge or opportunity to know that some injury was threatened, and that by his prompt intervention he might have prevented or mitigated it, authorizing a recovery.

Carriers—Carriage of Passengers—Acts of Fellow Passengers—Obligation of Conductor.*—If an injury to a passenger inflicted by a fellow passenger could not have been foreseen, or was not the reasonable or probable consequence of the omission of the conductor to eject the offender, the carrier would not be liable.

Appeal from Municipal Court, Kenosha County; Clifford Randall, Judge.

Action by Enoch Kline against the Milwaukee Electric Railway & Light Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Van Dyke, Rosecrantz, Shaw & Van Dyke, for appellant.
Calvin Stewart, for respondent.

TIMLIN, J. This is an action by a passenger to recover from the defendant, an interurban carrier, damages caused by a knife wound inflicted on plaintiff by another passenger. The jury found that the defendant's conductor in the exercise of ordinary care ought to have known from the conduct of the assaulting passenger that a physical injury to one of defendant's passengers was threatened and should have attempted to prevent such injury. This want of ordinary care on the part of the conductor was the proximate cause of the injuries complained of, and there was no contributory negligence. It is contended that there is no evidence to support the finding that there was negligence on the part of the conductor. The testimony is not very satisfactory. Taking that of defendant's witnesses, there was no negligence on the part of the conductor because the murderous assault followed swiftly the first indications of danger. Taking that version of the testimony most favorable to support the verdict, it would appear that the plaintiff boarded an interurban car at Kenosha apparently bound north for Racine. He first took his seat in the main body of the car, and he was stabbed while sitting in the rear or smoking compartment of the car by a passenger called Rose, who, with another passenger, known in the case only as "Rose's partner" (R. P.), also boarded the car at Kenosha and remained in the smoking compartment. The witness Hammer was sitting in the body of the car on a seat next to the smoking compartment and facing north, and near him, and also in the body of the car, were

*See foot-note on preceding page.

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the plaintiff and his six or seven year old daughter. According to this witness, the whole time covered from Kenosha to the place where the stabbing occurred was five or six minutes, and the car had covered a distance of several miles passing several stopping places.

The sequence of events was as follows: (1) Grossly obscene language by Rose continuing. (2) An affray between Rose and R. P. in which the hat of one was knocked off his head and out of the car. (3) An attempt by one to pull the bell cord and stop the car. (4) Conductor, having begun to take up fares and tickets at front or north end of the car, reached in so doing the last seat in the main body of the car on which Hammer was sitting, and took Hammer's fare or ticket, and Hammer asked him to stop the car and put Rose off. (5) Conductor entered the rear or smoking compartment and tried to collect fares there and had an argument. (6) Conductor came out of the smoking compartment into the body of the car and proceeded up to the front end. (7) Mr. Kline left his little daughter with Hammer and went back into the smoking compartment to try to stop the use of obscene language, and asked Rose to quit the use of such language, and the latter, who was then struggling with some others, stabbed Kline. (8) Conductor and others, overpowered Rose and took his knife. Some of plaintiff's witnesses vary from this.

The witness Leo S., who testified through interpreter, rode in the smoking compartment, and the sequence of events, according to him, was: (1) Car started, and Rose and his partner began to have some "kind of an interfering." (2) Conductor came to the smoking compartment to collect tickets. Rose could not find his ticket. Conductor took up the ticket of Leo S., and said to him, referring to Rose and his partner, "These snakes are mad." Leo S. replied to conductor: "You better stop the car and throw them off because they are looking for trouble." (3) Conductor went to the other compartment. Rose began to swear and use obscene language, struck his partner, and knocked his hat out of the window. (4) R. P. stood up and tried to ring the bell to stop the car. (5) Leo S. called the conductor to stop the car, and conductor motioned with his hand. (6) Rose opened his valise and took out a hat for his partner and began to swear again. (7) The conductor came from the front to the hind end, and Leo S. said to the conductor for the third time: "Please stop the car and throw these men off. This man looks for trouble." (8) Rose made a menacing gesture toward the conductor (showed him the back of his hands). (9) Leo S. requested Rose to stop this language, which Rose had been using from the time the car started until he stabbed Kline. (10) Rose jumped at Leo S. with his knife, and the hands of the latter were full of blood.

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The sequence of events, according to Adam Kikosicki, who rode in the smoking compartment, was: (1) Language passing between Rose and his partner witness did not understand. (2) A fist fight between Rose and his partner. (3) A hat of one knocked off out through the window. (4) One attempted to seize the bell cord to stop the car. (5) Conductor entered smoking compartment and took up witness' ticket. Rose had no ticket. (6) Conductor went forward to collect fares. (7) Rose again began to use abusive language. (8) Leo S. remonstrated to conductor, informing the latter, "Try to do something with those boys, because you may have trouble." (9) Conductor stood in the smoking compartment for a while. (10) Conductor went to the center of the car. (11) Conductor returned to the smoking compartment again. (12) Leo S. said to the conductor again, "Try to do something with those boys, because you will have trouble." (13) Conductor did not answer, but went out of the smoking compartment. (14) Rose drew his knife and tried to stab Leo S. The latter ward off the blow. (15) Rose tried to stab Leo S. again and struck the plaintiff.

According to Walter Kikosicki, the sequence of events was: (1) Obscene language on the part of Rose. (2) Quarrel between Rose and his partner and blows. (3) Knocking off the hat. (4) Attempt to pull the bell cord. (5) Request by Leo S. to the conductor that he stop the car and put Rose off. (6) Remonstrance by Leo S. to Rose against the use of this language. (7) Attack by Rose with a knife on Leo S. (8) Leo S. ward off blow of the knife, and the blow fell on Kline.

The testimony of the several witnesses is more or less vague as to the period of time in which these events occurred. But there is the positive testimony of several witnesses that the conductor had his attention called to the conduct of the passenger Rose two or three times before the stabbing occurred. Not only was his attention called to this obstreperous passenger, but there was said to him what was equivalent to a request for protection. If the testimony of several witnesses be taken as true, there was some interval between these requests. The outrageous conduct of Rose began when he entered the car and continued up to the time of the stabbing. The conductor was in the smoking compartment and endeavored to collect fare from Rose.

[1] While the conductor might not be required to infer that a passenger, drunken, noisy, and obscene, would assault and strike any of his fellow passengers, yet he would in the exercise of ordinary care be required to keep a vigilant supervision over such passenger for the purpose of preventing him injuring or annoying the other passengers, and he should refuse to carry such passenger on his train and either himself remove him or

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telephone for the public authorities if necessary to remove such passenger. The duty of a conductor in such emergency is no doubt delicate and difficult, and his responsibility is heavy. But this is true of many relations in life.

[2] Assuming there was evidence to show that the conductor had notice of this boisterous and quarrelsome condition of the passenger Rose, and that he ignored several requests from other passengers to expel this passenger, and that he left the other passengers to protect themselves as best they could, there was sufficient for the jury to find that the conductor did not exercise his duty to protect the other passengers. *Brown v. Chicago, etc., Ry. Co.*, 139 Fed. 972, 72 C. C. A. 20, 2 L. R. A. (N. S.) 105, 3 Am. & Eng. Ann. Cas. 251, and cases in note; *Hillman v. Georgia P. R., etc., Co.*, 126 Ga. 814, 56 S. E. 68, 8 Am. & Eng. Ann. Cas. p. 222, and cases in note.

[3] It is necessary in such case to bring home to the conductor knowledge or opportunity to know that some injury was threatened or was probable, and to show that by his prompt intervention he might have prevented or mitigated it. But these are the ultimate conclusions which the jury may draw from any competent evidence legally tending to establish them.

[4] There was such evidence in this case.

[5] Where the injury could not have been foreseen or was not the reasonable or probable consequence of the omission of the conductor to eject a drunken passenger from the train, the railroad is not liable. *Putnam v. Broadway, etc., Ry. Co.*, 55 N. Y. 108, 14 Am. Rep. 190. The instant case is not one where this court can say that this appears as a conclusion from the evidence.

It follows that the judgment of the circuit court should be affirmed.

Judgment affirmed.

SANDEN *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Montana, April 22, 1911.)

[115 Pac. Rep. 408.]

Carriers—Carriage of Passengers—Special Contract—Change.—A special contract of carriage, which provided, among other things, for a continuous trip, and that it was subject to exchange at any point on the route for a continuous passage check, was not changed by the issuance of such a check which indicated the same class of passage and time limit as the ticket, but provided that, if it showed a 30-day limit, stop-over privileges might be had on application to the conductor, for the check in no wise altered any of the terms of the original contract.

Carriers—Construction of Contracts.—One who accepts a contract and avails himself of its provisions is bound by the stipulations and conditions contained therein, though it be a contract of carriage.

Contracts—Construction—Failure to Read.—Though a contractee failed to read the terms of a written contract, he is bound thereby.

Carriers—Carriage of Passengers—Tickets.*—The ordinary card ticket for which full fare is paid being merely a token or check, upon the sale of which the law makes the contract, the purchaser is not expected to read the printed matter thereon, but a special ticket purchased at a reduced rate is notice to the purchaser, and he is bound by the terms therein, and hence travelers having a special contract of passage which did not allow them to stop over cannot, having stopped over, complain that they were ejected from another train on which they took passage and refused to pay full fare, for Rev. Codes, § 5350, provides for the ejection of persons declining to pay their fare.

Carriers—Carriage of Passengers—Tickets—Conditions—Waiver.†—A condition in a special contract ticket that it should be used before a date and that there should be no stop-over cannot be waived after the ticket was exchanged for a continuous passage check which on its face showed that the limit was too short for the conductor to allow a stop-over by either the conductor or station agents along the line.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

*For the authorities in this series on the question whether mere acceptance of a passenger ticket includes assent to its printed conditions, see first foot-note of *Gomm v. Oregon R. & Nav. Co.* (Wash.), 32 R. R. R. 495, 55 Am. & Eng. R. Cas., N. S., 495.

†For the authorities in this series on the subject of the authority of the carrier's employees to waive the conditions of contracts for the transportation of passengers, see first foot-note of *Johnson v. Michigan United Rys. Co.* (Mich.), 30 R. R. R. 346, 53 Am. & Eng. R. Cas., N. S., 346; last foot-note of *Baltimore, etc., R. Co. v. Evans* (Ind.), 29 R. R. R. 609, 52 Am. & Eng. R. Cas., N. S., 609; extensive note, 38 R. R. R. 322, 61 Am. & Eng. R. Cas., N. S., 322.

Sanden v. Northern Pac. Ry. Co

Action by Mina Sanden against the Northern Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

James M. Hinkle and Chas. A. Wallace, for appellant.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for respondent.

BRANTLY, C. J. The purpose of this action is to recover damages alleged to have been sustained by plaintiff by being wrongfully ejected from one of defendant's trains by the conductor in charge thereof. On October 7, 1907, Frank Sanden purchased at the ticket office of defendant at St. Paul, Minn., transportation for himself and plaintiff, his wife, represented by two tickets, from that point to the city of Seattle, Wash., by way of Butte, Mont. The tickets were in the form of contracts, both signed by the husband. It is not controverted that in signing plaintiff's ticket her husband acted as her agent, and that she was bound by the stipulations contained therein in so far as she should be bound by them. The body of the ticket is the following:

Good for One Continuous Second-Class Passage.
St. Paul (U. D.) Minn., to Seattle, Wash.

Subject to the following contract:

1st. This ticket is not good for passage if it shows any alterations or erasures.

2d. In accepting this ticket, which is not transferable, having been sold at a reduced rate, the holder whose signature is attached hereto, expressly agrees to use the same for a continuous trip to destination before midnight of date cancelled by punch mark in margin; otherwise the holder further expressly agrees to forfeit this ticket and pay full fare to destination.

3d. The purchaser agrees that the value of his [or her] baggage does not exceed \$100.

4th. This ticket is subject to exchange, either whole or in part, at any point on the route for a continuous passage ticket or check.

A. M. Cleland, General Passenger Agent.

[Signed] Frank Sanden, Purchased.

[Signed] Witness.

The punch marks on the margin allowed up to and including October 12 within which to complete the journey. The two immediately entered a regular through train of defendant, bound to their destination. A short distance from St. Paul the train

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auditor took up both tickets and delivered in their stead exchange or identification checks, of which the following is a copy:

30 Day Limited	1st Class Limited	2d Class Limited	Half
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Northern Pacific Railway Co.

Conductor's Exchange Check. Non-Transferable,
and subject to forfeiture if presented by any person other than the
original holder.

To Point Cancelled in Margin.

This check entitles the holder, whose appearance must correspond with description indicated by punch marks in left-hand margin, to one passage of class, and to the destination cancelled hereon. The date cancelled in margin indicates the limit of ticket in lieu of which this check is issued, and this check must therefore be used to destination before midnight of such date. Stop-over may be allowed on this check if it bears a thirty-day limit (upon application to conductor).

A. M. Cleland, Gen'l. Passenger Agent.

The punch marks in the margin of the one delivered in lieu of plaintiff's ticket indicated the physical description of the plaintiff, the destination to which she was bound, the date at which her journey should end, and also that the ticket for which the check was issued was a second-class limited ticket. On the back, under the words "Signature of Passenger," is written the signature of Frank Sanden. It is admitted that he signed this also as the agent of plaintiff. On the way between St. Paul and Butte the plaintiff and her husband, desiring to stop off at the latter place, applied to the conductors on the different divisions to know whether they were entitled to know whether they were entitled to stop-over privileges on the tickets purchased by them. They were informed that they were, but were referred to the conductor in charge on the run into Butte. As the train was approaching Butte, they inquired of this conductor as to their right to stop-over privileges. They were informed that they could stop over for one day and take the same train on the following day, but that they had best consult the ticket agent at Butte. This they did when the train arrived there, and were advised by him that, since their tickets allowed them one day longer than the schedule time between St. Paul and Seattle, they could stop over for that one day. Thereupon both left the train and remained there during the day. On the next day, intending to resume their journey, they entered the train indicated by the conductor and agent. When their tickets were demanded, they presented the exchange checks. The con-

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ductor refused to accept them, though both informed him of what had been told them by the agent at Butte and the conductor in charge on the preceding day, and required them to pay full fares or leave the train. They declined to pay the required fares, and when the train reached Durant, a small station in the mountains about 18 miles west of the city, they left it. This was between 9 and 10 o'clock in the evening. They remained there until 2 o'clock on the following morning, when they returned by train to Butte. It is not alleged, nor does it appear that the conductor used any force or threats to induce them to leave the train. Nor does it appear that they were exposed for want of proper shelter.

The theory of the complaint is that the plaintiff had the right to rely upon the information given by the conductor and the agent at Butte, and that, notwithstanding she received no written permission from either to stop over, she was nevertheless entitled after being verbally informed by them that she could stop over to resume her journey and complete it to her destination. The pleadings are voluminous, but present only two issues, viz.: Whether the conductor or the agent or both gave plaintiff the information alleged, and the extent of the injury which she suffered. Upon the facts shown by the evidence, substantially as stated above, the trial court, being of the opinion that the plaintiff was not entitled to recover, directed a nonsuit, and judgment was entered for the defendant accordingly. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

The contentions made by counsel for plaintiff may be stated thus: (1) That by taking up the ticket purchased at St. Paul, and delivering in lieu thereof the exchange or identification check, the defendant substituted a new and different contract from that contained in the ticket, that under the recitals contained in the check the question whether the plaintiff was entitled to stop-over privileges was left to the conductor to whom she applied to decide, and that, having decided as he did, she was entitled to act upon his decision; and (2) that, though the recitals in the check are not subject to the construction given them by the conductor, and she would otherwise have been bound by the terms contained in the ticket, yet she had a right to rely upon the information given her by the conductor. The argument is that in either case the conductor of the second train had no right to eject her, and hence that the defendant is liable for the wrong suffered by her at his hands.

[1] The substitution of the check for the ticket in no wise changed the terms of the original contract. The check clearly indicated by its recitals and the punch marks on the margin the class of passage to which the holder was entitled, and the limit within which the trip must have been completed. It clearly

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indicated the time limit of the ticket in lieu of which it was issued. It also contained the information that a stopover could be allowed only in case the check which indicated the same limit bore upon its face a 30-day limit. A casual reading of it, with an observation of the punch mark cancellations, even if she had not read the ticket, would have informed the plaintiff that she was entitled to a continuous passage only within the limit designated. Since it was stipulated in the ticket that it would at any time be subject to exchange for the check, and since the check in no wise changed any of the conditions and stipulations in the ticket, its only office was to identify the plaintiff and the character of her contract. It was therefore not a substituted contract with different terms and conditions, but left the original ticket contract to control the rights of the parties. Nothing was left to the discretion of the conductor.

[2, 3] By the current of authority the rule is well settled that one who accepts a contract and proceeds to avail himself of its provisions is bound by the stipulations and conditions contained in it; and the rule applies to contracts of carriage, both of passengers and property, provided only the conditions are reasonable and not prohibited by law. *Brian v. Oregon Short Line R. Co.*, 40 Mont. 109, 105 Pac. 489; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Mosher v. St. Louis, I. M., etc., R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 21 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Daniels v. Florida Central P. R. Co.*, 62 S. C. 1, 39 S. E. 762; *Gulf C. & S. F. Ry. Co. v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54; *Southern, etc., Ry. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Freeman v. Atchison, T. & S. F. Ry. Co.*, 71 Kan. 327, 80 Pac. 592; *Heffron v. City Railway*, 92 Mich. 406, 62 N. W. 802, 16 L. R. A. 345, 21 Am. St. Rep. 601; *Hanlon v. Railway*, 109 Iowa, 136, 80 N. W. 223; *Hill v. Syracuse, Bing. & N. Y. R. Co.*, 73 N. Y. 352, 29 Am. Rep. 163; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Harris v. Gr. West. Ry. Co.*, L. R. 1, Q. B. Div. 515; *York, etc., Co. v. Illinois Central Ry. Co.*, 3 Wall. 107, 18 L. Ed. 170. He is bound by the terms of the contract, whether he has read them or not. *Boylan v. Hot Springs R. Co.*, *supra*; *Watson v. L. & N. R. Co.*, 104 Tenn. 194, 56 S. W. 1024, 49 L. R. A. 454; *Daniels v. Florida Central P. R. Co.*, *supra*.

[4] The ordinary card ticket for which full fare is paid is generally regarded as a mere token or check, the purpose of which is to indicate the route over which the passenger must travel. Upon a sale of it the law makes the contract. The purchaser is not expected to read the printed matter thereon to ascertain whether there are any unusual stipulations, because he is not put upon his guard, nor has he had his attention di-

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rected to them, so that he may be presumed to have accepted conditions other than those which the law imposes. *Fonseca v. Cunard Steamship Co.*, supra; *Watson v. L. & N. R. Co.*, supra; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469. If, however, he has purchased a ticket at a reduced rate and the circumstances are such as to notify him of this fact, he is bound by the printed conditions upon it, whether he reads them or not or whether he is capable of reading them. *Watson v. L. & N. R. Co.*, supra. In this case the plaintiff not only expressly agreed to the limitations embodied in the ticket, but did so in consideration of the reduced rate at which she obtained it, and hence must be presumed to have understood them. Her right to recover, then, depends upon whether the conductor and agent, or either, at Butte, had authority to waive any stipulation in the contract so as to permit her to stop over. If this is so, the defendant was bound by their action. The plaintiff and her husband had the right to resume their journey at the end of the time limit fixed by them. The conductor of the train which they entered for this purpose committed an actionable wrong in ejecting from it. Otherwise, they were trespassers and he was authorized to eject them. Rev. Codes, § 5350; *Mosher v. St. Louis, I. M. & S. Ry. Co.*, supra, and cases cited.

[5] Now, what right had the plaintiff to accept and act upon the statements of either the conductor or agent? By the terms of the contract she was bound to know that she was to make a continuous trip under the penalty of forfeiting her ticket and being compelled to pay full fare, and hence that she was not entitled to a stop-over. By the statement contained in the check, which plainly indicated what her rights were, she was notified that upon that kind of a ticket the conductor was not authorized to grant a stop-over. Hence she is not in a position to claim either that she was misled by the statement of the conductor or that he had authority to waive the stipulation with reference to the stop-over. Upon the face of it was expressed the condition under which he, and he only, could grant the privilege. She was also bound to understand that the agent had no authority to bind the defendant by his action. He had not sold the ticket, and therefore was not acting within the apparent scope of his authority. The plaintiff was properly nonsuited.

The case of *Tarbell v. Northern Central Ry. Co.*, 24 Hun (N. Y.) 51, is not in point. In that case the plaintiff was entitled to a stop-over upon the ticket purchased by him. The regulations of the defendant required the holder of a ticket who desired to stop over at an intermediate station to apply to the conductor for a stop-over ticket. The plaintiff upon application to the conductor was told that he could stop over at such a station

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and take the next train. He did not obtain a stop-over ticket, but left the train relying upon the statement of the conductor. It was properly held that he had the right to complete his journey on the next train, from which he was ejected, because he was entitled to rely upon the statement of the conductor. The conductor had a general authority to grant stop-over privileges. So far as the plaintiff was concerned, it was not of moment how the conductor executed this authority.

The judgment and order are affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

SUTTON v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Feb. 27, 1911.)

[79 Atl. Rep. 719.]

Carriers—Injuries to Passengers—Presumption of Negligence.*—

In an action by a passenger for injuries sustained while alighting from a train, no presumption of negligence arises from the fact that there is a thin layer of ice on the steps of the car.

Carriers—Negligence—Question for Jury.†—In an action for injuries to a passenger alighting from a car, the question of defendant's negligence is for the jury, where there is evidence that ice on the step had accumulated on a prior day, or at such an hour that proper inspection would have discovered it.

Appeal from Court of Common Pleas, Philadelphia County.

Action by W. Henry Sutton against the Pennsylvania Railroad

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see first foot-note of *Levin v. Philadelphia, etc., R. Co. (Pa.)*, 37 R. R. R. 755, 60 Am. & Eng. R. Cas., N. S., 755; foot-note of *Reems v. New Orleans, etc., R. Co. (La.)*, 37 R. R. R. 570, 60 Am. & Eng. R. Cas., N. S., 570; first foot-note of *Eaton v. New York Cent., etc., R. Co. (N. Y.)*, 37 R. R. R. 252, 60 Am. & Eng. R. Cas., N. S., 252; first foot-note of *Central of Georgia Ry. Co. v. Brown (Ala.)*, 37 R. R. R. 197, 60 Am. & Eng. R. Cas., N. S., 197; foot-note of *O'Callaghan v. Dellwood Park Co. (Ill.)*, 37 R. R. R. 182, 60 Am. & Eng. R. Cas., N. S., 182; second foot-note of *Taber v. Seaboard A. L. Ry. (S. C.)*, 36 R. R. R. 466, 59 Am. & Eng. R. Cas., N. S., 466; third foot-note of *Gardner v. Metropolitan St. R. Co. (Mo.)*, 36 R. R. R. 448, 59 Am. & Eng. R. Cas., N. S., 448; foot-note of *Blew v. Philadelphia Rapid Transit Co. (Pa.)*, 36 R. R. R. 447, 59 Am. & Eng. R. Cas., N. S., 447.

†See last foot-note of *Caywood v. Seattle Elect. Co. (Wash.)*, 37 R. R. R. 796, 60 Am. & Eng. R. Cas., N. S., 796.

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Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John Hampton Barnes, for appellant.

Owen J. Roberts and Isaac O. Sutton, for appellee.

ELKIN, J. Appellee, while alighting from the front platform of the first car of the train on which he was a passenger, slipped on a thin layer of ice which covered, or partially covered, one of the steps. In the fall that resulted from this slippery condition, he received the injuries for which damages are sought to be recovered in this action.

The assignments of error raise two questions, namely, did the presumption of negligence arise under the facts of the case, and, if no such presumption did arise, were the proofs offered at the trial sufficient to submit to the jury on the question of negligence?

It is contended that the learned trial judge erred in affirming the fourth point submitted by the plaintiff. This point asked the court to instruct the jury that: "It is the duty of the defendant to provide safe cars and appliances for the accommodation of its passengers, and, if the plaintiff was injured by reason of the unsafe condition of the platform of the car, a presumption of negligence arises, which places the burden upon the defendant to explain the occurrence in a way not consistent with its negligence." This point would have correctly stated the law, if the injuries complained of had resulted from failure to provide safe cars and appliances for the accommodation of passengers, but the facts do not warrant the application of the rule.

[1] There was no evidence that the steps, or platform, or car, or appliances ordinarily used in transportation, were improperly constructed or maintained, or that they were in a defective condition at the time of the accident. The presumption in such cases only shifts the burden of proof and does not arise, unless the evidence shows that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation. *Thomas v. Railroad Company*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Ginn v. Railroad Co.*, 220 Pa. 552, 69 Atl. 992. There was no such evidence in the case at bar. No attempt was made to show defective construction or negligent maintenance of the equipment of the cars or other appliances of transportation. Under these circumstances, we are constrained to hold that the presumption relied on had no application.

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It is argued that the thin layer of ice on the step of the platform made its condition defective, within the meaning of the rule. No authority is cited to sustain this contention, and a consideration of our own cases leads to a different conclusion. To hold that ice, formed on the step of a platform as the result of a storm, is part of a car, or of the machinery and appliances of transportation, would do violence to the meaning of words. While the precise question has not been determined by this court, there are a number of cases in which it has been practically ruled. In *Fearn v. Ferry Company*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366, this court, in passing upon the question raised under the facts of that case, said: "In such cases the presumption of negligence arising from the mere fact that one is injured while a passenger in the care of a carrier company has no application." To the same general effect are *Hayman v. Railroad Company*, 118 Pa. 508, 11 Atl. 815; *Farley v. Traction Company*, 132 Pa. 58, 18 Atl. 1090; and *Bernhardt v. Railroad Company*, 159 Pa. 360, 28 Atl. 140. We therefore hold that it was error to affirm plaintiff's fourth point, and that the first assignment of error must be sustained.

We, however, do not agree with the contention of appellant that a verdict should have been directed for the defendant, or that judgment non obstante veredicto should have been entered upon the whole record. It is a close case, but as we read the testimony the inference of negligence might be reasonably drawn by the jury from the facts.

[2] At least it was for the jury to say whether, taking into consideration all the facts, appellant knew, or should have known by proper inspection, of the accumulation of ice on the steps and had been negligent in not sooner removing it, or in taking some measures to protect passengers from slipping while alighting from the car. All of this depends very largely upon how long the slippery condition had existed. This is a question of fact, and not of presumption. There is no dispute as to the ice being on the step, and the question for determination is whether it had formed during a snowstorm through which the train was passing, in which event no liability would attach to the transportation company, or had accumulated on a prior day or at an earlier hour, and had been negligently permitted to remain on the step when proper inspection would have discovered it. The evidence is contradictory as to the condition of the weather on the day of the accident. There is some testimony that the day was cloudy, but that "it had not been raining or snowing" on the morning of the accident. It is true there was the testimony of the weather forecaster from which the inference might be drawn that a snowstorm had been in progress in the region traversed by the train on the morning in question. At most this presented

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a conflict of testimony as to an important fact, which, as a general rule, is for the jury. Again, we are not convinced the evidence established the fact that no ice was on the step when the train left Paoli. It is not denied that the ice was on the step when the train reached Board Street Station, and, if the jury should find as a fact that it had not passed through a snowstorm that morning, it would be a fair inference that the ice had accumulated at some prior time. If so, the inference of negligence in permitting the ice to remain on the step for an undue length of time could be reasonably drawn by the jury.

The facts developed at the trial are meager and unsatisfactory. They are not so clear as to warrant a court in saying, as a matter of law, that no inference of negligence could be drawn, and we are of opinion they are sufficient to be submitted to a jury for the purpose of having the question of negligence determined. The burden of proof is on the plaintiff to establish the negligence relied on to sustain a recovery, and he must make out his case without the aid of the presumption, the benefit of which was given him at the trial in the court below. When the case is again tried, all the facts relating to the weather conditions on the morning of the accident and bearing upon the length of time the ice was permitted to remain on the step, as well as all other facts tending to prove or disprove negligence, should be more clearly established, in order that the court and jury may have more accurate information as to the real merits of the case.

Judgment reversed, and a venire facias de novo awarded.

LE DEAU v. NORTHERN PAC. RY. CO.

(Supreme Court of Idaho, April 20, 1911.)

[115 Pac. Rep. 502.]

Carriers—Carriage of Passengers—Injury to Passenger—Rock Rolling from Mountain.*—L., while riding on a railway train, was struck by a rock or boulder which rolled from the mountain side,

*For the authorities in this series on the subject of the duty of a railroad, as a carrier of passengers; to furnish and maintain safe tracks and roadbed, see third foot-note of *Arkansas Cent. R. Co. v. Janson* (Ark.), 32 R. R. R. 481, 55 Am. & Eng. R. Cas., N. S., 481; extensive note, 2 R. R. R. 776, 25 Am. & Eng. R. Cas., N. S., 776.

For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see last paragraph of third foot-note of *Sherman v. Southern Pac. Co.* (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407; last foot-note of *St. Louis, etc., R. Co. v. Woods* (Ark.), 38 R. R. R. 404, 61 Am. & Eng. R. Cas., N. S., 404; third head-note of *Indiana Union Traction Co. v. Keiter*

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and received an injury for which he sought to recover damages from the railroad company; the evidence failed to show the cause which set the rock in motion or the place from which it started, but did satisfactorily show that the stone did not come from the face of the cut through which the train was running or from the company's right of way, and the evidence failed to show any negligence on the part of the company. Held, that the railroad company was not liable for damages sustained on account of the injury thus received.

Carriers—Carriage of Passengers—Injury to Passenger—Actions—Burden of Proof.†—Where an accident occurs and an injury is received by a passenger on a railway train, and the evidence clearly discloses that the injury was not caused by any defect in the machinery or appliances used by the company in the operation of its road, or by any defect in the construction of the road, and was not caused by any act of the employees of the company, or of any person in charge of the train, there is no presumption of negligence on the part of the railway company, and it is incumbent on the party seeking relief to prove negligence.

Carriers—Carriage of Passengers—Injury to Passenger—Stone Rolling from Mountain—Negligence.*—A railroad company will not be held liable for an injury inflicted on a passenger by reason of a stone rolling down the mountain side and striking the passenger, unless it is shown that the company had either actual notice of the danger, or that the place or immediate locality from which the rock fell was so obviously dangerous as to impute notice of the danger to the railroad company, and charge it with negligence in failing to take reasonable precautions to prevent an injury from such cause.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Charles B. Le Deau against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

E. J. Cannon, George M. Ferris, and R. L. Black, for appellant.

McFarland & McFarland, for respondent.

AILSHIE, P. J. Respondent obtained a judgment against defendant for \$1,287.75, damages, alleged to have been sustained

(Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; second foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; second head-note of *Washington, etc., Ry. Co. v. Trimyer* (Va.), 37 R. R. R. 114, 60 Am. & Eng. R. Cas., N. S., 114.

*See foot-note on preceding page.

†For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see first foot-note of preceding case.

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by reason of personal injuries received by respondent while riding on appellant's railway train. The respondent took passage on appellant's train at Houston Station, Mont., for a trip to Cœur d'Alene City, and, while traveling between Taft and St. Regis stations, a rock or boulder rolled down the mountain side, passed through the car window, and struck respondent on the shoulder, inflicting a serious blow.

It appears that the railroad track runs around a precipitous, rocky mountain side, and that at the place where the accident occurred the track passes through a cut in the point of a spur of the mountain, and that this cut is about 20 feet deep. From the top of the open cut, the mountain slopes back and is rather rugged and precipitous, and is covered with loose rock and boulders. No one saw the rock start, and no one pretends to testify as to the cause which started it, or the place from which it fell. The respondent testifies that when he first saw it, it was in the air, some 10 or 20 feet from him, and apparently had come from high up on the mountain; that it was coming with great force. Another witness, who at the time sat on the seat beside respondent, saw the rock at about the same time, when it was in the air, falling toward respondent. It broke through the top of the car window and struck respondent on the shoulder, and rolled off onto the floor. The evidence varies as to the size of the stone; but it was somewhere from three to twenty pounds in weight. Some evidence was introduced to show that the company had notice that rocks frequently rolled down this mountain side and lodged on the track, and that it had been necessary at times to stop the train and have them rolled off before passing. This is the substance of all the evidence given in the case.

[1] The appellant contends that the evidence is not sufficient to charge the railroad company with negligence, and it is therefore not sufficient to support the verdict and judgment. The only question for consideration is that of negligence. It is clear from this evidence that the rock did not fall from the side of the cut. It was evidently not an overhanging or loose rock left on the face of the cut through which the track was laid. The respondent seems to think that the rock came from high up on the mountain side, and that theory is borne out by the testimony of the other witnesses, as well as by the surrounding circumstances, and the actual falling of the stone and its striking the car at the height and place where it did strike. It must have come from a considerable distance, in order to have gained a sufficient momentum to drive it from the place where it last struck the ground above the face of the cut, and carry it through the car window in the direction in which it was passing when it struck respondent.

It is clear, therefore, that the accident did not occur by rea-

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son of anything which the appellant or its agents or employees did, nor did it occur through any defect in the appliances which appellant was using, or the instrumentalities it was employing as a common carrier. The only theory on which appellant could be held for the results of this accident would be that it owed to respondent, and to all of its passengers, an active duty to employ such means as were necessary and sufficient to either clear the mountain side of loose and overhanging rock and stone or else to construct along its right of way such retaining walls or barriers as would be likely to prevent rock and stone from rolling down the mountain side onto its track. To require such an active duty on the part of a railroad company operating in this inter-mountain region, where roads are necessarily built through canyons and around mountain sides, where the bluffs and hills rise precipitously for hundreds and sometimes thousands of feet above, would be imposing upon the company a duty that would be burdensome, and might sometimes prove prohibitive to transportation companies. The mere suggestion of building retaining walls along railroad rights of way through some of the canyons and ravines in this mountainous country, demonstrates its futility. No company could support such an expense.

On the other hand, we have no doubt but that the railroad company is under an active duty and obligation to its passengers to take such reasonable precaution as is necessary to remove or prevent obvious dangers, whether they be on its right of way or beyond its right of way. *Filbin v. Chesapeake, etc., Ry. Co.*, 91 Ky. 444, 16 S. W. 92; note to *Barnowski v. Helson*, 15 L. R. A. 33. But what might be termed an apparent and obvious danger along a railroad track in some sections of the United States, especially in less mountainous and rugged sections, would clearly not be considered an obvious danger along a line of road through the mountains, canyons, and gorges of this country, and particularly in Northern Idaho.

It should be remembered that in this case the respondent did not attempt to prove that the appellant's right of way, or the mountain side at the particular place where this accident occurred, was unusually dangerous, or presented obvious and patent dangers to the traveling public, against which the appellant ought to have taken special precaution or have made specific effort to remove.

[2] Our attention has been called to a few authorities which deal with the principle involved in this case. *Fleming v. Pittsburgh, C., C. & St. L. R. Co.*, 158 Pa. 130, 27 Atl. 858, 22 L. R. A. 351, 38 Am. St. Rep. 835, was an action to recover damages for the death of the plaintiff's daughter, caused by a rock rolling down the mountain side and passing through the car window and striking the girl, resulting in her death. In the

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course of the opinion the court said: "In the present case, it is not shown that the accident was in consequence of a defect in any of the appliances or machinery used, or of the negligence of appellant's employees in their conduct of the train. It was the result of a rock becoming detached, and falling upon the train, while passing a point where the hill descends precipitously to the track. From it, at the place of the accident, to the top of the hill, is a distance of 456 feet. The cut for the railroad extends upward 33 feet, and above it is the natural hill. The rock which fell started at about 100 feet from the top of the hill, bounded down some 40 feet, struck again bounded 20 or 30 feet, making four bounds before it struck the train and caused the death of appellee's daughter. It is clear that the fall of the rock was in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employees in the conduct of the train, or in the construction of the road, and therefore there is no presumption of negligence on the part of appellants."

[3] In the case of *Thomas v. Pennsylvania & Reading R. R. Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416, the plaintiff, while sitting in defendant's car, received a violent blow on his left arm, causing a fracture of the bone. The blow was inflicted by a hard substance hurled from some place outside and beyond the car. No one knew what the object or substance was that had inflicted the injury, nor was any one able to tell from whence it had come, or the cause which had driven it in the direction of the car. The trial court took the case from the jury and ordered a nonsuit. On appeal, the court, speaking through Paxson, Chief Justice, said: "The rule appears to be that where a passenger is injured, either by anything done or omitted by the carrier, its employees, or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence. But, to throw this burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation. In *Pennsylvania R. Co. v. MacKinney* [124 Pa. 462, 17 Atl. 13, 2 L. R. A. 820, 12 Am. St. Rep. 601], *supra*, there was evidence from which a jury might infer that the injury was the result of some negligence on the part of one or more of the employees of the company, and which excluded, to some extent, the inference that it could have occurred at the hand of a stranger, or some one not connected with the company. * * * There was nothing in the evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or in any of the appliances of transportation. There was noth-

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ing, therefore, to submit to a jury. It would be as reasonable to hold that a bullet fired into the car from without, by means of which a passenger is killed, is evidence of negligence on the part of the company."

The opinion in the foregoing case was approved and followed in *Ginn v. Pennsylvania R. R. Co.*, 220 Pa. 552, 69 Atl. 992. The latter was a case where a passenger, while sitting at a window in the company's car, was struck by a missile hurled from some unknown source. The court distinguished the *Ginn* Case from the *Thomas* Case, holding that in the latter case the injured party had presented sufficient evidence to preclude the probability that the object which struck him came from beyond the company's track or right of way, and that the evidence rather raised the presumption that it must have come from some place on the company's track or right of way. See, also, *Spencer v. Chicago, M. & St. P. Ry.*, 105 Wis. 311, 81 N. W. 407; *Filbin's Adm'r v. Chesapeake, O. & S. W. R. Co.*, 91 Ky. 444, 16 S. W. 92.

The judgment must be reversed, and it is so ordered, and a new trial is granted. Costs awarded in favor of appellant.

SULLIVAN, J., concurs.

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(Supreme Court of Illinois, Feb. 25, 1911.)

[94 N. E. Rep. 175.]

Courts—Precedents—Construction of Federal Statutes—Similar State Statute.—Though the state courts are bound by the construction placed upon a federal statute by the federal courts, the state courts are not required to apply to a state statute the construction placed by the federal courts on a similar federal statute; but where the two acts are nearly identical, and the state act was passed after the federal statute had been construed and both statutes were to effect the same object, the state court will be inclined to adopt the construction given to the federal statute by the federal courts.

Master and Servant—Railroads—Equipment—Statutes—Negligence—Duty to Servant.—Under Laws 1905, p. 350, § 2, providing that it shall be unlawful for a common carrier to use cars not equipped with automatic couplers, it is the absolute duty of a railroad company to comply with the statute, and a servant injured in consequence of a failure to so comply may recover irrespective of the question of negligence of his employer.

Pleading—Election between Counts—Injuries to Servant—Statutes—Automatic Couplers.—Where an injured servant based his action on two counts, the first on Laws 1905, p. 350, requiring common car-

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riers to equip their cars with automatic couplers, and the second on the federal statute making the same requirement as to interstate carriers, it was error to compel plaintiff to elect upon which count he would proceed, where the evidence justified the submission of the case to the jury on both counts.

Appeal and Error—Review—Judgment of Intermediate Court—Questions of Fact.—Where plaintiff's evidence justified the trial court in submitting the issues to the jury and the judgment was affirmed by the Appellate Court, the findings of fact are conclusive upon the Supreme Court.

Railroads—Automatic Couplers—Construction of Statute.—Laws 1905, p. 350, § 2, providing for automatic couplers on cars, applies to empty as well as to loaded cars.

Commerce—Interstate Traffic—What Constitutes.*—The character of the traffic, as intrastate or interstate, in which a car is being used at the time of an injury, is to be determined from the proof as to the points between which the car was being moved at the time, irrespective of whether the road was an interstate road or whether the car was sometimes used in interstate traffic.

Commerce—Interstate Traffic—What Constitutes—Evidence.*—In an action for injuries to a switchman by defective couplers, held, that the evidence fairly showed that the car was being used not for interstate commerce, but for commerce within the state.

Appeal and Error—Constitutional Question—Effect of Appeal to Appellate Court.—A railroad company, sued for injuries arising from a violation of Laws 1905, p. 350, § 2, requiring common carriers to provide automatic couplers on their cars, by taking an appeal to the Appellate Court, waives its objection to the constitutionality of the statute, and cannot raise such question on a subsequent appeal to the Supreme Court.

Commerce—Intrastate Commerce.—The powers over commerce not delegated to the federal government by the Constitution are reserved to the states, and a state may pass such laws regulating commerce within the state as it deems expedient.

Commerce—Interstate Commerce.*—If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, the commerce is domestic, and subject to state control.

Commerce—Subjects of Regulation—Railroads—Equipment.—Congress may enact laws requiring all railroads to equip their cars with safety appliances, but the exercise of that power does not preclude a state from making similar regulations as to roads engaged in intrastate commerce.

*For the authorities in this series on the question whether or not cars were being used in carrying on interstate commerce on a particular occasion, see foot-note of *Chicago & N. W. Ry. Co. v. United States* (C. C. A.), 34 R. R. R. 495, 57 Am. & Eng. R. Cas., N. S., 495; first foot-note of *Hockfield v. Southern Ry. Co.* (N. C.), 34 R. R. R. 492, 57 Am. & Eng. R. Cas., N. S., 492.

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Commerce—Subjects of Regulation—Railroads—Equipment.—That a railroad may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in carrying on intrastate commerce, where such regulations are not repugnant to the acts of Congress in regard to railroads engaged in interstate commerce.

Commerce—Subjects of Regulation—Railroads—Automatic Couplers.†—The federal automatic coupler act, providing that it shall apply to all trains used in interstate commerce, and to all other locomotives, cars, etc., used in connection therewith, is not repugnant to Laws 1905, p. 350, making the same regulations as to cars engaged in intrastate commerce, and providing that the act shall apply to common carriers engaged in moving traffic by railroad between points in the state, except those used in interstate commerce.

Master and Servant—Injuries to Servant—Assumed Risk—Railroads—Automatic Couplers.‡—Under Laws 1905, p. 350, § 2, requiring railroad companies to provide automatic couplers, and section 9, providing that employees shall not be deemed to assume the risk of injury from noncompliance with the statute, by remaining in the service of the railroad company, a switchman cannot be held to have assumed the risk of injury from going between cars not provided with such couplers, in the performance of his duties, if he was free from negligence in other respects.

New Trial—Verdict Contrary to Instructions to Jury.—Where the verdict is in accordance with the law and the evidence, it will not be set aside because the jury disregarded erroneous instructions given at the request of the defeated party.

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Willard M. McEwen, Judge.

Action by Frank J. Luken against the Lake Shore & Michigan Southern Railway Company. There was a judgment for plaintiff, and from such judgment and an order denying defendant's motion for a new trial defendant appealed to the Appellate Court, which affirmed the judgment and order, and defendant brings error. Affirmed.

†For the authorities in this series on the subject of state regulation of, or interference with, interstate commerce, see foot-note of *Southern Ry. Co. v. King* (U. S.), 37 R. R. R. 45, 60 Am. & Eng. R. Cas., N. S., 45; first head-note of *Detroit, etc., R. Co. v. State* (Ohio), 36 R. R. R. 625, 59 Am. & Eng. R. Cas., N. S., 625; last paragraph of last foot-note of *Davis v. Cleveland, etc., Ry. Co.* (U. S.), 35 R. R. R. 92, 59 Am. & Eng. R. Cas., N. S., 92; foot-note of *Yazoo, etc., Co. v. Greenwood Grocery Co.* (Miss.), 35 R. R. R. 417, 58 Am. & Eng. R. Cas., N. S., 417.

‡For the authorities in this series on the subject of the effect of contributory negligence of, or assumption of risk by, the injured servant on the right to recover against his employer under an employers' liability act, see last foot-note of *Ryland v. Atlantic C. L. R. Co.* (Fla.). 35 R. R. R. 56, 58 Am. & Eng. R. Cas., N. S., 56.

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Glennon, Cary, Walker & Howe, for plaintiff in error.

James C. McShane, for defendant in error.

FARMER, J. This action was brought by defendant in error (hereafter referred to as plaintiff) against the plaintiff in error (hereafter referred to as defendant) to recover damages for personal injuries.

Defendant is operating a line of railroad running from Chicago, Ill., to Buffalo, N. Y., and is a common carrier of passengers and freight. Plaintiff was at the time of his injury a switchman employed by defendant at its yards in Chicago. At about 1:30 o'clock a. m., July 15, 1905, he was assisting in making up a transfer train composed of 45 cars located on one of the tracks of defendant in its yards. Plaintiff's duty was to couple the cars, and while thus engaged he received the injury complained of. The cars were equipped with automatic couplers, but the coupler on one car was not in working order, and would not couple by impact. Plaintiff went between the cars for the purpose of endeavoring to effect the coupling, and, while endeavoring to put the coupler in such condition that it would work, the cars were moved and brought together, severely injuring him.

The declaration contains two counts. The first count is based upon the statute of this state requiring the use of safety appliances on railroads engaged in moving traffic between points in the state of Illinois. Section 2 makes it unlawful for any such common carrier to haul any car used in moving such traffic which is not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Laws 1905, p. 350. Said first count charges the violation of this statute by defendant by hauling and using upon its line of railroad in moving traffic between points in the state of Illinois a certain car equipped with a certain automatic coupler which, by reason and in consequence of its then improper and defective condition of repair, could not be coupled automatically by impact without the necessity of switchmen going between the ends of the cars. The second count is based on the federal statute requiring common carriers engaged in interstate traffic to equip their cars with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Said second count charges the violation of this statute by defendant by hauling and moving upon its line of railroad a certain car used in moving interstate traffic, equipped with an automatic coupler which was in such defective and improper condition that the car could not be coupled automatically by impact without the necessity of switchmen going between the ends of the cars.

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Defendant pleaded the general issue, and a trial was had by a jury. At the conclusion of all the evidence, defendant moved the court to require plaintiff to elect under which count the case should be submitted to the jury, and, over the objections and exceptions of plaintiff, the court required an election. Thereupon plaintiff elected to go to the jury on the first count of the declaration. The jury returned a verdict in favor of the plaintiff, assessing his damages at \$10,000. After the return of the verdict, on motion of the plaintiff, the court vacated the order requiring an election, and, after overruling motions for a new trial and in arrest of judgment, rendered judgment on the verdict. Defendant prosecuted an appeal to the Appellate Court for the First District, and that court affirmed the judgment of the trial court. The case is brought to this court by writ of certiorari.

Plaintiff testified that, before the cars were brought together to couple them by impact, he examined the couplers to see if they were in order, and found the knuckle of the car in question would not open. He made some effort to open it and get it in condition to couple, but, failing to do so, went to another car north of it, and examined the coupling on it. He then returned to the car in question, and again endeavored to open the knuckle and get the coupler in condition, but found it would not open so the coupling could be made. In attempting to get the coupler in condition he had to go between the cars and use his hands. While thus engaged, the cars were brought together and plaintiff was injured. There is no proof as to the length of time the coupler had been defective or out of order, and defendant contends that the evidence failed to show it violated any duty it owed to plaintiff. Defendant's position is that, the car having been equipped with an automatic coupler, it was incumbent on plaintiff to show that its defective condition was known, or by the exercise of reasonable care might have been known, by it before the injury. In addition to the testimony of plaintiff, the conductor in charge of the train that was being made up testified that he tried to effect the coupling twice by impact—once before plaintiff was injured and once afterwards—and failed each time. After the second failure the car was placed on the repair track. There was no proof of the coupler being out of order or defective previous to the time mentioned by the plaintiff and the conductor.

While both the Illinois statute and the federal statute require cars to be equipped with couplers coupling automatically by impact, so that they can be uncoupled without requiring men to go between the ends of the cars, in considering the federal statute the Supreme Court of the United States, in *Johnson v. Southern Pacific Railway Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, held the statute should be

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so construed as to promote in the fullest manner the apparent policy and object of its adoption, and that it was intended to, and did, cover both coupling and uncoupling cars. Both the state and federal acts were passed to protect men engaged in these duties, and it cannot be denied that it is the duty of the carrier to equip its cars with automatic couplers and maintain them in such condition that the cars can be coupled and uncoupled without employees being required to go between them in performing their duties, and the federal courts, in cases arising under the federal statute, have by an almost uniform line of decisions held that the duty of the carrier is not merely that of exercising reasonable care in maintaining the prescribed safety appliances in an operative condition, but is absolute. *Norfolk & Western Railroad Co. v. United States*, 177 Fed. 625, 101 C. C. A. 249; *St. Louis, Iron Mountain & Southern Railroad Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *United States v. Atchison, Topeka & Santa Fe Railway Co.*, 163 Fed. 517, 90 C. C. A. 327; *Chicago, Burlington & Quincy Railroad Co. v. United States*, 170 Fed. 556, 95 C. C. A. 642.

In *Norfolk & Western Railroad Co. v. United States*, *supra*, will be found a very large collection of cases decided by the federal courts holding that it is the absolute duty of common carriers not to haul cars which are not equipped with safety appliances that will operate for the purpose for which they are required to be provided, and relief from liability provided for noncompliance with the act cannot be obtained by showing reasonable care and want of intentional violation of the statute. The court refers to *St. Louis & San Francisco Railroad Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, and *United States v. Illinois Central Railroad Co.*, 170 Fed. 542, 95 C. C. A. 628, both decided by the Circuit Court of Appeals for the Sixth Circuit holding a contrary rule, but says those cases are contrary to the great weight of authority.

In construing a federal statute, this court is bound by the construction placed upon the act by federal courts. In construing a similar state statute we are not necessarily bound to follow the construction of the federal courts in construing a federal statute, but where, as here, the two acts are so nearly identical and the state act was passed after the federal statute had been construed and both acts were intended to accomplish the same object, we would naturally incline to follow the construction given the federal statute by federal courts. But in our opinion the construction placed upon the federal statute by the federal courts is the sound and proper construction, and, in the absence of federal authority, we would give the state statute the same construction that the federal courts have given the federal statute, by holding that the duty imposed upon the car-

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rier to equip and maintain safety appliances in such condition and state of repair that they will operate in the manner and for the purposes intended is absolute, and the carrier cannot be heard to say in defense of an action brought by one injured in consequence of its failure to perform its duty that the plaintiff is bound to prove that the carrier did not exercise reasonable care to maintain the safety appliances in good condition and repair. The court properly refused three instructions offered by defendant that it was incumbent upon the plaintiff to prove that the defendant knew, or by the exercise of reasonable care might have known, of the defective condition of the coupler.

We think the trial court erred in requiring plaintiff to elect under which count the case should be submitted to the jury. Plaintiff's evidence made a case against the defendant that justified its submission to the jury, and it should have been submitted under both counts. Defendant now insists that if there was any liability shown by the testimony it was under the second count, and that count having been taken from the jury by election under the ruling of the court, and by the instructions given, no recovery could be had, under the evidence, under the first count. In the view we take of the case, we do not find it necessary to determine whether the action of the court in vacating the order of election after the verdict was returned was erroneous or not. If the evidence of the plaintiff fairly tended to sustain the first count of the declaration, the court was justified in submitting the issues to the jury under that count, and the affirmance of the judgment of the trial court by the Appellate Court in that event would be conclusive upon us. In our opinion the evidence of the plaintiff, which was uncontradicted, fairly tended to make a case under the first count. The proof shows the car was being moved from defendant's yards at Park Manor to the Union Stockyards, both of said points being within the state of Illinois. While it is true defendant's railroad is an interstate road and defendant is engaged in interstate traffic, it is also engaged in intrastate traffic. What point the car in question came from (which was a Chicago, Milwaukee & St. Paul car) and to what point it may have been finally destined to be hauled does not appear from the proof, but at the time the injury occurred the car was being hauled from one point in Illinois to another point in the same state. It was an empty car, but the law applies as well to empty cars as to loaded cars. The character of the traffic the car was being used for at the time of the injury is to be determined from the proof as to the points between which the car was being moved at the time, whether the road over which the car was being moved was an interstate road and whether the car was sometimes used in interstate traffic or not.

The defendant contends that the state has no power to reg-

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ulate intrastate traffic being carried over an interstate road, and that the statute of the state of Illinois, in so far as it attempts to do so, is invalid, because the power to regulate such traffic is conferred by the Constitution of the United States upon Congress, and is prohibited to the states. Under repeated decisions of this court defendant waived the right to question the validity of the statute by prosecuting its appeal to the Appellate Court. *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37; *Barnes v. Drainage Com'rs*, 221 Ill. 627, 77 N. E. 1124; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. City of Chicago*, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. Rep. 316. The validity of the Illinois statute is therefore not properly before us, but we deem it not improper to say that, if it were, we could not agree to the position of defendant. The Constitution of the United States confers power on Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Article 1, § 8, cl. 3. Under this provision Congress derives its power to regulate interstate commerce. All powers not delegated to the federal government by the Constitution are reserved to the states, and the states have full power over commerce which does not assume the character of interstate commerce, and may pass such laws regulating commerce within the states as they may deem expedient or politic. If the places from which and to which passengers and property are carried, and the line over which they are carried, are within the state, then the commerce is domestic and is subject to state control. The transportation of property between points within a state by a railroad engaged in interstate traffic does not of itself determine the character of the traffic and make it interstate commerce. It is not the character of the road by which property is transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce. Congress may enact laws requiring all railroads engaged in interstate commerce to equip their cars with safety appliances, but the exercise of that power does not preclude a state from enacting laws requiring all roads engaged in intrastate commerce to equip their cars with safety appliances. The fact that some roads may be engaged in both interstate and intrastate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the safety of men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to the acts of Congress adopted for the regulation of railroads engaged in interstate commerce. *People v. Chicago, Indianapolis & Louisville Railway Co.*, 223 Ill. 581, 79 N. E. 144; *People v. Erie Railroad Co.*, 198 N. Y. 369, 91 N. E. 849; *Detroit, T. & I. Railway Co. v. State*, 82 Ohio 60, 91 N. E. 869; *Missouri Pacific Railway Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330,

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54 L. Ed. 472; *Missouri, Kansas & Texas Railway Co. v. Harbor*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; 2 *Elliott on Railroads*, 690; 4 *Id.* 1671.

Section 1 of the federal act provides that it shall apply "to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith." Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143). Section 7 of the Illinois statute provides that it shall "be held to apply to common carriers engaged in moving traffic by railroad between points in this state, * * * excepting those trains, cars and locomotives exempted by the provisions of section 6 of this act, and all those trains, locomotives, tenders, cars and similar vehicles used in interstate commerce." There is no repugnancy between these provisions of the federal and state acts. The act of Congress applies to all interstate carriers in moving interstate commerce, but it does not deprive the state of power to regulate intrastate commerce although it is carried by a railroad doing an interstate business. Section 2 of the federal statute and section 2 of the Illinois statute are substantially identical, except that the federal act applies to interstate traffic and the Illinois act applies to traffic within the state. Said section of the federal statute makes it unlawful for common carriers governed by the provisions of the act to haul or permit to be hauled over their lines cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be coupled without the necessity of men going between the ends of the cars. Section 2 of the Illinois statute imposes the same requirement upon common carriers moving state traffic. Section 8 of the federal statute is as follows: "Any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge." Act March 2, 1893, c. 196, 27 Stat. 532. (U. S. Comp. St. 1901, p. 3176). Section 9 of the Illinois act reads as follows: "Any employee of any such common carrier who may be injured by any train, locomotive, tender, car or similar vehicle in use contrary to the provisions of this act, shall not be deemed to have assumed the risk thereby occasioned, nor to have been guilty of contributory negligence, because of continuing in the employment of such common carrier or in the performance of his duties as such employee after

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the unlawful use of such train, locomotive, tender, car or similar vehicle had been brought to his knowledge." There is no repugnancy between any of these provisions. Section 8 of the federal act exempts the employee from the assumption of the risk by continuing in the employment of the carrier after the unlawful use of a locomotive, car, or train has been brought to his knowledge. Section 9 of the Illinois statute contains the same provision, with the additional clause that the employee shall not be deemed to be guilty of contributory negligence because of continuing in the employment of the carrier, in the performance of his duty, after knowledge of the unlawful use of the locomotive, tender, or car. The federal statute has been construed as abolishing the doctrine of assumed risk in all cases to which the statute is applicable. *Schlemmer v. Railway Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Johnson v. Southern Pacific Railway Co.*, supra; *St. Louis, Iron Mountain & Southern Railroad Co. v. Taylor*, supra. In the *Schlemmer Case* the court said: "We are clearly of opinion that *Schlemmer's* rights were in no way impaired by his getting between the rail and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk." Under the Illinois statute plaintiff cannot be held to have assumed the risk of injury by going between the cars in the performance of his duties, and it does not appear that he was negligent in any other respect.

It is also contended that the verdict was contrary to certain instructions given by the court on behalf of defendant. The instructions referred to, we think, did not correctly state the law, but they were altogether favorable to defendant and could not possibly have prejudiced it before the jury. A verdict will not be disturbed which is in accordance with the law and the evidence, even if it is contrary to erroneous instructions given at the request of the party against whom the verdict is rendered. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631; *West Chicago Street Railroad Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Dickson v. Swift Co.*, 238 Ill. 62, 87 N. E. 59.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

STATE *ex rel.* RAILROAD COMMISSIONERS *v.* ATLANTIC
COAST LINE R. CO.

(Supreme Court of Florida, Division A, March 16, 1911.)

[54 So. Rep. 900.]

Mandamus—Return—Sufficiency.—The sufficiency of the return to an alternative writ of mandamus may be determined on a motion for a peremptory writ.

Carriers—Management—Governmental Regulation.—The Constitution and statutes of this state considered together contemplate that the initial discretion as to the operation of trains shall be in those charged with the management of the railroad operations, and that the exercise of such discretion shall be subject to lawful governmental regulation.

Carriers—Regulation by Railroad Commission—General Powers.*—The difficulty of making a specific enumeration of all such powers as the Legislature may intend to confer upon Railroad Commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms; and general powers given are intended to confer other powers than those specifically enumerated.

Carriers—Orders of Railroad Commissioners—Regulation by Courts.†—Relief against an unreasonable and unjust order by the Railroad Commissioners that the running of a regular intrastate train carrying passengers shall not be discontinued may be had in due course of law; and an unlawful refusal or failure of a railroad company to comply with a valid requirement may be redressed in the manner provided by law.

Carriers—Regulation of Trains.—Even if the information necessary to the determination of the question whether a train should be discontinued is not accessible to the Railroad Commissioners except through the railroad company, it does not relieve the commissioners of the duty to supervise and regulate the operation of trains, nor does it deprive them of any authority they have to acquire the information in the way provided by law.

Commerce—Interstate Commerce—Passenger Trains.‡—The duty imposed upon railroad companies to make written application to the Railroad Commissioners for their consent before discontinuing

*For the authorities in this series on the subject of the powers of railroad commissions, see last foot-note of *State v. Florida E. C. Ry. Co.* (Fla.), 35 R. R. R. 423, 58 Am. & Eng. R. Cas., N. S., 423.

†For the authorities in this series on the subject of review by courts of the proceedings of railroad commissions, see foot-note of *St. Louis, etc., R. Co.* (Okla.), 35 R. R. R. 430, 58 Am. & Eng. R. Cas., N. S., 430; fifth head-note of *State v. Florida E. C. Ry. Co.* (Fla.), 35 R. R. R. 423, 58 Am. & Eng. R. Cas., N. S., 423; first head-note of *Interstate Commerce Commission v. Northern Pac. R. Co.* (U. S.), 36 R. R. R. 410, 59 Am. & Eng. R. Cas., N. S., 410.

‡See second foot-note of preceding case.

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any regular intrastate train carrying passengers is not an unlawful burden upon or a regulation of interstate commerce.

Carriers—Regulation of Railroad Commissioners—Review by Courts.—Where it clearly appears from the pleadings that a regulation of the Railroad Commissioners is lawful and just, it is not necessary to take testimony upon the subject.

(Syllabus by the Court.)

Application by the State, on the relation of the Railroad Commissioners, for a writ of mandamus to the Atlantic Coast Line Railroad Company. Writ granted.

A motion to quash the alternative writ herein having been overruled (*State ex rel. v. Atlantic Coast Line Ry. Co.*, 60 Fla.—, 54 South. 394), the respondent filed the following return:

"Now comes the Atlantic Coast Line Railroad Company, respondent in the above-entitled cause, and, answering the alternative writ of mandamus, for answer says:

"(1) Respondent admits that it is in possession and control of the lines of railroad mentioned in the first paragraph of the said alternative writ, and that it is operating the same as a common carrier of property and persons in this state.

"(2) It admits that it has operated since July 1, 1902, and is still operating, many regular intrastate passenger trains in Florida.

"(3) Answering the third paragraph of the alternative writ, it admits that the Railroad Commissioners, of the state of Florida on December 3, 1908, after a hearing before them, prescribed rule 12 of 'the Rules Governing the Transportation of Passengers,' that this respondent was present at said hearing, and protested against the putting into effect of said rule. Respondent admits that it had due notice of the adoption of said rule, and that same should take effect January 1, 1909.

"(4) Answering the fourth paragraph of the alternative writ, respondent says that, without previously applying to the Railroad Commission for consent, it has discontinued since January 1, 1909, certain intrastate passenger trains in Florida, which trains were not passenger trains put on for special occasions, such as fairs, carnivals, conventions, excursions, and the like; but that respondent, further answering, says that, after the discontinuance of said trains, the Railroad Commission of this state gave their consent to and acquiesced in the withdrawal of said trains, thus conclusively demonstrating that in these cases the respondent, in the exercise of its initial discretion, committed no abuse of discretion, and, whenever this respondent has discontinued a train, such act has always met with the approval of the commission.

"(5) Respondent denies the power of the Railroad Commis-

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sioners to prescribe said rule 12, and denies that there has been any omission of duty on the part of this respondent as to the discontinuance of trains, and asserts that by section 2803 of the General Statutes of the state of Florida the question as to discontinuance of trains is within the discretion of this respondent.

"Further answering, respondent says that there is no power in relators to require this respondent to make application to the Railroad Commissioners of this state for their consent when respondent proposes to discontinue a train; that the part of rule 12 sought to be enforced by the alternative writ involves the details of management and the control of the business of this respondent, and is peculiarly within its discretion, for the reason that, when it is desired to discontinue a train, the officials of the company resort to the following sources of information, which are not accessible to the Railroad Commission, save and except as they may be furnished by this respondent upon making such application, should the commission have the determination of the question: Reports of conductors and superintendents as to the number of passengers carried for a given time by a given train between given points; reports of auditor of passenger receipts and conductors showing the amount of fare paid by each passenger so carried, and the total income in money from the operation of said trains during said period; expenses of operation, involving also the question of distribution of work among various train crews and the working agreements existing between respondent and the labor organizations to which members of train crews belong; distribution of work among employees so as to comply with the federal act relating to hours of service; proposed installation of other trains at different hours which will meet the reasonable requirements of the public convenience.

"Moreover, while rule 12 under consideration does not undertake to apply to the through or intrastate trains operated by respondent, yet the conditions in Florida are such that many of the intrastate trains are put on and taken off with reference to the payment of the interstate tourist train service. Respondent necessarily must be in touch with, and fully advised of, the large and extraordinary volume of business which is handled into Florida on its interstate trains, and must, when the tourist travel is proceeding to such a point that the intrastate trains specially provided for this abnormal business are no longer needed and can no longer be operated except at a loss, fix its train movements, arrangements, and schedules, and change the same so as to provide and eliminate train service which in intrastate business can be justified only on account of the volume of travel brought about by the tourists. It undertakes at all times to afford to the ordinary traveler in the state of Florida all reasonable facilities for transportation commensu-

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rate with the volume of business, the growth of the section served and the revenue derived therefrom, and it affords train service fully adequate to the proper requirements of the situation, although at times operating the same at continuous loss. Many of its schedules are made with reference to the business interchanged with other lines, and the volume of that business is dependent upon conditions of the character aforesaid and of the arrangements made with other lines, whereby discontinuances are frequently made on less than 10 days' notice required by rule 12 before, under the terms thereof, the carrier can be authorized by the commission to discontinue such service. In all of the aforesaid matters the wisdom of continuing the train service is one with which the carrier is specially familiar, and as to which its judgment is reached upon a broad business plan. Respondent has found that upon the discontinuance of any intrastate train objection is made by some people who desire a service to be continued for their particular benefit which is clearly against the interest of the carrier and the fair requirements of the carrier's business to continue in force. In addition, the selfish interests of the carrier would make it alert to continue any service which it found remunerative, either directly or indirectly, and these indirect or correlated benefits are solely within the knowledge of the carrier. Likewise, there may be correlated losses or injuries of which the commission is not advised, and which are only known to this respondent. The carrier uses skilled investigators in securing the information from the sources hereinbefore mentioned and in reaching conclusions therefrom in the determination of the question of discontinuing a train, and the Railroad Commission cannot give the same intelligent investigation to the question as is given by respondent. As illustrative of the difficulties which the carrier has to meet in complying with the conditions of rule 12, respondent points out that on August 18, 1910, it made application to the commission to discontinue trains Nos. 153 and 156, operated between Croom and Brookville, and permission to discontinue was granted by the commission, and subsequent thereto the commission revoked said consent without making proper investigation of the necessities of the public or the returns to the carrier and instructed respondent to continue said train service. And respondent says that, with all due deference to the Railroad Commissioners of the state of Florida, respondent is of the opinion that the wishes of the occasional traveler have greater weight with said commission than the conclusions reached after investigation by the carrier as to the actual necessities of the public in a situation of which this respondent is peculiarly informed and of which it should, under the discretion vested in it by law, be the judge.

"The facts together with the sources from which they are de-

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rived and the conclusions reached therefrom set out in the foregoing paragraphs, are details of management which necessarily cannot, unless furnished by the respondent, be before the commission when they act upon an application for consent sought to be required by the alternative writ. If this respondent must supply these details to the Railroad Commission—and the question cannot be determined without a knowledge of such details—respondent urges that the encroachment of the commission upon the management and control of the company's business is apparent, and cannot be disguised under the name of regulation. If this respondent is forced, whenever it proposes to discontinue a train, to make application to the Railroad Commission for their consent, as provided in rule 12, it will be forced to supply all these details and the information covered thereby, and forward same to the commissioners along with application. Therefore, if this respondent is required to make application to the Railroad Commission for their consent to discontinue a train and furnish them the detailed information above set forth, the initial discretion in the matter of taking off the particular train properly vested in respondent will thereby be taken away and become vested in relators."

The relators move to strike the latter part of the fourth paragraph, and severally the first, second, third, and fourth subdivisions of the fifth paragraph of the return, and for a peremptory writ of mandamus.

L. C. Massey, for relators.

W. E. Kay, for respondent.

WHITFIELD, C. J. (after stating the facts as above). [1] The fourth paragraph of the return is an express admission of the allegation of the alternative writ that the respondent has discontinued some of its regular trains carrying passengers and running wholly within this state, without previously making application to the Railroad Commissioners for their consent thereto. Subsequent averments of this paragraph of the return that the commissioners had consented to and acquiesced in the withdrawal of such trains, thus conclusively demonstrating that in the exercise by the respondent of its initial discretion no abuse was committed, and that whenever respondent has discontinued a train it had been approved by the Commissioners, may be disregarded, since they are not responsive to the alternative writ. The writ does not undertake to redress past acts, but only to require the respondent to make application for the consent of the commissioners whenever in the future the discontinuance of a regular train carrying passengers wholly within this state is contemplated by the respondent in the exercise of its initial discretion in the operation of its railroads in this state. The sufficiency of the return may be determined on the motion for a peremptory writ.

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[2] In the former opinion, it was held that "the provision of rule 12 sought to be enforced is not an attempted exercise of arbitrary control and management of the respondent's railroad in rendering the public service; nor does it unduly interfere with the initial discretion of the railroad officials in the operation of trains. It is merely a regulation in aid of lawful efficient supervision within the authority and duty of the commissioners; and the provision is apparently reasonable. While the initial discretion as to the operation of trains is in those charged with the management of the railroad operations, such discretion is subject to lawful governmental regulation." This holding was made with a full appreciation of the terms of the statutes of the state including section 2803 of the General Statutes of 1906, which provides that "every railroad and canal company shall be empowered * * * to regulate the time and manner in which passengers and property shall be transported," as well as section 2893 of the General Statutes of 1906, which latter section does not limit the authority of the commissioners to connections at junction points. Any other conclusion would be to subvert the manifest legislative intent in enacting the general and special provisions referred to in the previous opinion, in recognition of the express mandate of the Constitution that "the Legislature invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other service of a public nature." Const. art. 16, § 30.

[3] The difficulty of making a specific enumeration of all such powers as the Legislature may intend to confer upon Railroad Commissioners for the regulation of common carriers in the interest of the public welfare renders it necessary to confer some power in general terms; and general powers given are intended to confer other powers than those specially enumerated. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, text 645, 47 South. 969.

As decided in the former opinion, it is within the statutory authority of the Railroad Commissioners in the discharge of their lawful duties of supervision to require the respondent to make application for consent before discontinuing a regular train carrying passengers wholly within this state, and that the enforcement of such a regulation in a lawful manner will not deprive the respondents of any constitutional right. The application for consent offers an opportunity for a useful discussion between the railroad officials and the commissioners of the conditions that suggest the discontinuance of a train tending to prevent arbitrary action and to secure governmental recognition of the discontinuance of a train in which the traveling public have an interest.

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[4] Relief against an unreasonable and unjust requirement by the commissioners that a train be not discontinued may be had in due course of law; and an unlawful refusal or failure of the respondent to comply with a lawful requirement may also be redressed in the manner prescribed by law for that purpose.

[5] The suggestion that the information necessary to the determination of the question whether a train should be discontinued is not accessible to the commissioners except through the respondent does not relieve the commissioners of the duty to supervise and regulate the operation of trains; nor does it deprive them of any authority they have to acquire the information in the way provided by law.

[6] The duty here enforced is not an unlawful burden upon or a regulation of interstate commerce, since it is in terms confined to intrastate service; and its effect, if any, upon interstate commerce, is merely indirect, incidental, and immaterial. *State v. Atlantic Coast Line Ry.*, 56 Fla. 617, text 663, 47 South. 969; *Southern Ry. Co. v. Atlanta Sand & Supply Co. (Ga.)* 68 S. E. 807, and authorities cited.

[7] It being clear that the particular regulation here enforced is not management and control of the respondent's railroad operations, but that it is lawful supervision and regulation, no testimony upon the subject is required.

This proceeding is to enforce as required by law an order of the Railroad Commissioners, who have full statutory powers if direct supervision and regulation of the initial discretion vested in the railroad company for the operation of the railroad; and it is not a case in which the court is asked to substitute its discretion for that of the respondent in the operation of trains.

The return is insufficient, and a peremptory writ of mandamus will issue when requested in due course.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

LOWRY *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 4, 1911.)

[70 S. E. Rep. 806.]

Carriers—Carriage of Freight—Connecting Carriers—Injuries to Freight—Actions—Burden of Proof.*—When goods delivered to an initial carrier in good order are delivered to consignee by the terminal carrier in bad order, the burden is on the latter to prove that he delivered them in the same condition he received them, and that he did not receive all the goods delivered to the initial carrier.

Carriers—Carriage of Freight—Loss of Freight—Action—Submission to Jury.—In an action against a terminal carrier for loss of and damage to goods shipped to plaintiff, evidence held to require the submission of the question of defendant's negligence to the jury.

Appeal from Common Pleas Circuit Court of Sumter County; Ernest Gary, Judge.

Action by E. A. Lowry against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

L. D. Jennings, for appellant.

Willcox & Willcox and *Mark Reynolds*, for respondent.

HYDRICK, J. Plaintiff sued to recover damages for the loss of certain articles and damage to others contained in a car load of household goods shipped to her from Henrietta, Tex. The bill of lading contained a list of the goods, and acknowledged them to have been in apparent good order when received by the initial carrier. At Augusta, Ga., they were transferred from one car to another, which was sealed and delivered to defendant for transportation to destination, Sumter, S. C. Defendant's testimony tended to show careful handling of the car while in its possession, and that the seals were not broken until arrival at Sumter, where the goods were unloaded into its warehouse, whence they were delivered to plaintiff. The agent of the Central Railroad of Georgia, who superintended the transfer at Augusta, testified that the goods were badly damaged before they were delivered to defendant; that he noted an exception that they were "all scratched," and also noted a number of pieces that were broken. He could not say whether there was any shortage or not, because he had no list, nor did he

*See foot-note of *Jenkins v. Atlantic C. L. Ry. Co. (S. C.)*, 37 R. R. 203, 60 Am. & Eng. R. Cas., N. S., 203; last head-note of *Gibson v. Little Rock, etc., Ry. Co. (Ark.)*, 35 R. R. 690, 58 Am. & Eng. R. Cas., N. S., 690; first head-note of *Kansas City Southern Ry. Co. v. Carl (Ark.)*, 35 R. R. 406, 58 Am. & Eng. R. Cas., N. S., 406.

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make a list of the goods put into the car which was delivered to defendant.

Plaintiff's testimony tended to show that the goods were more badly damaged and more pieces were broken when delivered to her than appeared from the notation of the agent at Augusta; and also that at least one piece—a kitchen table—was received by defendant which was not delivered to her. The defendant voluntarily paid for repairing a number of pieces, among them being some which had not been noted as broken by the agent at Augusta.

From the foregoing general outline of the testimony, it clearly appears that the circuit court erred in directing a verdict for defendant. When it appears that goods were delivered to the initial carrier in good order, and they are delivered to consignee by the terminal carrier in bad order, the law imposes upon the latter the burden of proving that he delivered them in the same condition that he received them, for in such a case the presumption is that they were damaged while in his possession. *Willett v. Railway*, 66 S. C. 477, 45 S. E. 93; *Walker v. Railway*, 76 S. C. 308, 56 S. E. 952. To be sure, the presumption may be rebutted; but, as pointed out, defendant's testimony fell short of doing so. The presumption is not only that defendant received the goods in the same condition as when delivered to the first carrier, but also that it received the entire shipment. *Walker v. Railway*, *supra*, and cases cited. The burden was therefore on defendant to show that it did not receive all the goods delivered to the first carrier, which it could not have done by showing exactly what it did receive. *Charles v. Railway Co.*, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762. It did attempt to show that it delivered all that it received by showing that it received the car under seal, which was not broken until arrival at destination, where the goods were unloaded into its warehouse, and that they were afterwards delivered to plaintiff. This, however, was not conclusive; for, as pointed out, the testimony of defendant's agent tended to show that a certain table was taken from the car and out into the warehouse, and plaintiff's testimony was that it was never delivered to her. Now, if the table was lost from the warehouse, a reasonable inference might have been drawn that other missing articles were also.

Besides, the voluntary payment for repairs to the broken furniture was evidence of an admission of liability which required submission of the case to the jury.

Reversed.

JONES, C. J., and GARY and WOODS, JJ., concur.

SPIZALE *v.* LOUISIANA RY. & NAVIGATION CO.

(Supreme Court of Louisiana, Feb. 13, 1911. Rehearing Denied March 27, 1911.)

[54 So. Rep. 714.]

Railroads—Operation of Trains—Negligence.—Where it was not customary for a railroad company to ring the bell or sound the whistle while switching in a yard, except when passing street crossings, the omission to do so on a particular occasion was not actionable negligence toward one familiar with the movements of the trains in the yard.

Railroads—Operation of Trains—Lookout.—In an action against a railroad company for injuries to a trespasser on the track, struck by an engine, evidence held not to show a failure of the engineer to keep a reasonable lookout.

Railroads—Injuries to Trespassers on Track—Liability.*—A railroad company, occupying for its tracks and terminals a strip of ground over which no street crosses for 2,711 feet, does not owe any duty to a trespasser to cover a drain on the strip.

Railroads—Trespassers—Liability.†—A railroad company owes to a trespasser only the general duty to keep a reasonable lookout in moving its trains, and not to run over him after having seen him.

(Syllabus by Editorial Staff.)

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Mary B. Spizale, on her own behalf and in behalf of her infant son, against the Louisiana Railway & Navigation Company. From a judgment for plaintiff, defendant appeals. Reversed, and action dismissed.

Foster, Milling, Brian & Saal, for appellant.
E. S. Whittaker, for appellee.

PROVOSTY, J. The plaintiff's little son, 11 years old, was run

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to licensees or trespassers on railroad premises, see first foot-note of *Louisville & N. R. Co. v. Morgan* (Ala.), 36 R. R. R. 318, 59 Am. & Eng. R. Cas., N. S., 318; third head-note of *Conchin v. El Paso*, etc., R. Co. (Ariz.), 36 R. R. R. 192, 59 Am. & Eng. R. Cas., N. S., 192.

†For the authorities in this series on the subject of the care due licensees or trespassers on railroad tracks before their presence is discovered, see last foot-note of *Chicago*, etc., Ry. Co. *v. Smith* (Ark.), 37 R. R. R. 51, 60 Am. & Eng. R. Cas., N. S., 51; third head-note of *Chesapeake & O. R. Co. v. Lang* (Ky.), 36 R. R. R. 630, 59 Am. & Eng. R. Cas., N. S., 630; last paragraph of foot-note of *Chesapeake*, etc., Ry. Co. *v. Ball* (Ky.), 35 R. R. R. 238, 58 Am. & Eng. R. Cas., N. S., 238; second foot-note of *Chesapeake*, etc., Ry. Co. *v. Corbin* (Va.), 35 R. R. R. 229, 58 Am. & Eng. R. Cas., N. S., 229.

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over by a switch engine of the defendant company, and both his legs cut off; and plaintiff, in her child's behalf and also in her own, sues in damages.

After the defendant's road, on its way into the city and towards the river, has crossed Napoleon avenue, it enters upon a strip of ground belonging to the city, but of which by grant from the city the defendant company has the perpetual use for its tracks and terminals. This strip of ground is along the downtown embankment of the New Basin Canal. Along the base of the embankment there used to be a wide drainage canal. The defendant company has filled in this old canal for a considerable distance, beginning, we may say, at Carrollton avenue and going towards the river, and built a long, narrow warehouse upon the site. Beyond this warehouse, in the direction of the river, the old canal still exists and is usually full of water. The tracks are alongside of this warehouse and old canal. There are three of them—one main track and two side tracks. They are 13 feet apart from center to center. On the other side of them, 12 feet from them, is the fence of the White City amusement park and baseball grounds and a continuation of this fence. From Carrollton avenue to Hagan avenue, a distance of 2,711 feet, no street crosses this strip of ground, and only one street opens upon it and only on one side. The tracks are constructed as in the open country; that is to say, the earth is raised to the top of the cross-ties along the center of the track between the rails, and sloped towards the sides, so that the ends of the cross-ties are not filled between. As an effect of this construction, there is a depression between the tracks, and drains have had to be provided across the tracks for letting out the drainage water.

A freight train of 20 cars and a locomotive came across Carrollton avenue going towards the river, on the main track; the locomotive pushing the cars with its head end towards them. When the forward end of the train reached the first switch, which is about 1,500 feet from Carrollton avenue, six of the cars were kicked down the main track. The train then stopped and remained stationary about one minute. The forward end, from which the six cars had been detached, had gone one car length beyond the switch. As the next two end cars had to be switched to the side track, the train backed far enough to clear the point of the switch, or about two car lengths, and then moved forward again far enough to put the two cars upon the side track, and again stopped.

At the time the train began to move forward this last time to put the two cars upon the side track, the fireman, who was sweeping the coal dust on the floor of the engine, heard a noise, which he calls a scream, but which, on cross-examination, he described as follows:

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"Q. Was it a noise like a calf or a pig? A. It was a noise like—(witness grunts) I can't tell you exactly. Q. Was it loud or soft? A. It was not very loud. Q. Could a little boy have made a noise like that while you were backing a few minutes before, and you not hear it on account of the noise of the engine? A. He might have made the noise and I didn't hear him."

The fireman got off the engine and looked for the source of the noise, and saw the little boy under the locomotive. There was a small drainage ditch there across the track, and he was lying in it with both legs across the rail.

His story is that, on his way back from carrying a message for his mother to his brother, who was working in the White City amusement park, he had passed through a hole under the fence of the White City and had walked alongside of the track a distance of about 60 feet towards the locomotive; and that, when about 35 or 40 feet of it, seeing that it remained stationary, he had decided to cross the track; and that just as he stepped upon the track the locomotive started off and jerked the cars; and that the noise made thereby scared him, and, being afraid to run across the track, he went to turn around, and, as he did so, he stepped into the ditch which was behind him and fell.

The negligence charged against the defendant company is that the bell was not rung before the locomotive moved, nor the whistle sounded; that a proper lookout was not kept; and that this little ditch, or drain, was left uncovered.

The evidence shows that it was not customary to ring the bell or sound the whistle upon this yard while switching, except in passing the street crossing; then not doing so on this particular occasion was therefore not negligence. Moreover, the evidence shows further that the boy lived about a block from this yard, and was familiar with the movements of the trains upon it, and that he knew that this very train was engaged in doing switching work and constantly moving back and forth, and that it was therefore liable to move at any moment, and make the very noise which it made.

The engineer testifies that he was keeping a proper lookout; and he is not contradicted, except that it is shown that, while the train was stationary, he was so absorbed in conversation with the track foreman, who, in violation of the rules of the company, was riding upon the engine, that the signal for backing had to be given him twice. That circumstance, by the way, accounts for the train having remained stationary on that occasion longer than was usual or necessary. The engineer was not alone in failing to see the boy while the latter was, as he says, walking alongside of the track, or standing upon it; the fireman, the yardmaster, and the brakeman also did not see him.

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The yardmaster and the brakeman, it may be well to mention, were on the uptown or New Basin side of the track, and therefore on the side opposite to that from which the boy approached the track. The train was therefore between them, which may account for their not seeing him.

A track foreman who, with 15 other colored men, was repairing the track between Carrollton avenue and the place where the engine was stopped, and who had had to interrupt his work and remove his tools from the track in order to let the train pass, and who, after the train had passed, stood upon the track looking at the engine, about a hundred or more feet from it, to see whether it was coming back, in order that, in case it was not, he might resume his work, says that, after he had given his men the order to get the tools out of the way to let the train pass, he walked ahead to remove his "stop board" from the track, and at that moment saw the boy on the top of the White City fence, and did not at any time see him on the track.

Conceding, however for the argument, that this small drain in its uncovered state was so evidently a source of danger that the leaving of it in that condition amounted to negligence on the part of the defendant company, and conceding further that the statement of the boy as to the manner in which he fell into this drain is true, the defendant company owes him nothing, since it owed him no legal duty with reference to the drains upon its yard; and since, he being a trespasser upon its yard, it owed him no other duty than the general duty to keep a reasonable lookout in moving its locomotive, and not to run upon him after having seen him. Elliott on Railroads (2d Ed.) § 1258, vol. 3, page 612.

From the evidence as a whole we are inclined to believe that the boy fell into the ditch, not in the way he says, but while trying to steal a ride upon the footboard of the engine. This would account fully for his position, with both legs upon the track and unable to get out in time not to be run over. Whereas his being frightened by a noise which he was hearing every day, since he lived within a half a block from this yard and had but just heard, with which he was perfectly familiar; his trying to turn back, instead of going ahead and crossing the tracks; his inability to get out of the ditch or gutter in time to avoid a slow coming engine 35 to 40 feet away; and his not screaming so as to be heard by so many persons near by—all seem improbable. And, finally, if the witnesses are not mistaken in their estimate of how far the forward end of the train went beyond the switch, the train was not far enough in the direction of the river for the engine to have been clear of this drain, but the engine was over this drain while the train was stationary, and not 35 or 40 feet from it, as the boy says.

Judgment set aside, and suit dismissed, at plaintiff's cost.

DEMPSEY v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia, May 2, 1911.)

[71 S. E. Rep. 284.]

Trial—Demurrer to Evidence.—In considering a demurrer to evidence a proper test is whether the evidence would sustain a verdict for the party as to whose evidence the demurrer is entered, if one was returned by the jury and there was a motion to set it aside. If a verdict against the demurrant could not properly be set aside, there should be a judgment against him.

Railroads—Trespassers on Track—Infants.*—It is the duty of a locomotive engineer to look out for helpless trespassers on the track, so far as may be consistent with other duties of his position, and when he observes a child of irresponsible age on the track to take reasonable precaution for its safety.

Railroads—Injury to Child Near Track—Negligence.*—It is negligence, binding the railway company, for a locomotive engineer, when his other duties do not demand attention and the situation permits a view, to fail to observe a child of irresponsible age walking by the side of the track and in dangerous proximity thereto, or, when he does observe it and has distance in which to stop, to undertake to run a rapidly moving train by the child in that position.

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by James A. Dempsey, administrator, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Holt & Duncan, for plaintiff in error.

John S. Marcum and *John L. Stafford*, for defendant in error.

ROBINSON, J. A child sixteen months old was injured by a freight train of the defendant company so that it died. An administrator sued for damages in the premises. On the trial, defendant demurred to the evidence, the jury ascertained damages at \$1,500, and the court overruled the demurrer and entered judgment for plaintiff.

Two distinct grounds are submitted for a reversal of the judgment. First, it is asserted that negligence on the part of defendant has not been established. Second, the point is made that the injury resulted from the contributory negligence of the parents and that the same is imputable to the child.

[1] The real question with which we must deal, in the determination of the propositions presented to overthrow the judgment, is this: If the jury had found a verdict for plaintiff on

*See last foot-note of preceding case.

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the evidence taken from their consideration by the demurrer, would it be proper to set aside the verdict? In other words, could a jury have found from the evidence a warranted verdict for the plaintiff? If a verdict so found could not be sustained on motion to set it aside, then the judgment on the demurrer is erroneous; otherwise, it is not. *Kelley v. Railroad Co.*, 58 W. Va., at page 221, 52 S. E. 520, 2 L. R. A. (N. S.) 898. See, also, 4 Enc. Digest, Va. & W. Va., 540.

We have carefully considered the evidence. A verdict for plaintiff founded on it could not properly be disturbed. A finding of negligence on the part of defendant is sufficiently warranted. The case is very nearly controlled by *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

A jury reasonably could have believed that the child was on the track at the time the train was approaching, or so close to the track that the engine or cars were sure to endanger it. One reasonable inference is that the child wandered from its home near the railway, across the east bound track, to the space between the double tracks, and was toddling along that narrow, dangerous space in the direction its sister and other children had gone only a few minutes earlier. Again, it may be said that the little foot prints leading to the railroad, the place where the injured body was found immediately after the train had passed, and the time that elapsed after the child left the mother's sight, reasonably prove that the child was on the east bound track when the train was approaching, or across that track in the narrow space between the two tracks. These facts and circumstances place the child in a position where other evidence tends to prove that it was in full view from the engine when nearly 1,400 feet away. True, for a small part of this distance, portions of the engine, because of a curve, would cut off the engineer's view. But we deem this immaterial. There is evidence tending to establish that the distance from which the engineer first could see the child was one sufficient in which to stop the train before reaching it. The engineer testifies that he was looking ahead while running this distance and that he saw no child on the track. But a jury could say that the facts and circumstances proved in relation to the child's position contradicted the engineer's testimony. They could refuse to give his testimony credibility. Besides, the engineer does not say that he did not see the child walking by the side of the track. He invariably speaks of the track itself and not the space between it and the other track. A jury could reasonably believe that he was purposely not contradicting the facts and circumstances from which it may be inferred that the child was in that space at the time he says he was looking ahead. The time that the child had been out of the mother's sight was too short, as may well be inferred, for it to have been at some hidden point beyond the other track and to

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have come from its hiding and approached the train after the engine had passed. And there are other reasonable inferences which may be drawn from the evidence, supporting a conclusion that the child was either on the track or in the dangerous space between the tracks at the time the engineer first could see it. It may have been on the track and some part of the engine have pitched it where it lay. The engineer says he was looking ahead. He says he saw no child "on the track." A reasonable conclusion from the evidence, disregarding the credibility of the engineer as a jury could do, is that he did see the child on the track. At no time in his testimony does he directly contradict the fact that he did not see the child between the tracks. One may accept his statement that he did not see it on the track and reasonably conclude that the engineer saw the child between the tracks and took the risk of running by it.

The conductor, who was riding in the cab at the time, says he was looking ahead. But there is a proved admission by him which contradicts his testimony in this particular. Singularly enough he also refers only to the fact that he saw no child "on the track." He does not say that he did not see the child between the tracks. The testimony of the fireman is that he saw no child "on the track," but he does not know whether he was looking ahead at this particular place or engaged in firing the engine. A brakeman also was in the cab, but he is not produced as a witness. The cab was occupied by these four persons. Another reasonable inference that a jury could use in contradicting the testimony of the crew, if indeed it needs contradiction, is that they were engaged in conversation and attention to each other. They had just left a station. There the conductor and brakeman had joined the engineer and fireman in the cab. It was a natural time for comment and discussion.

[2] It was the duty of the engineer to observe this child, and to stop. 11 Enc. Digest, Va. & W. Va., 573; 2 Wood on Railroads, 1267. He was not engrossed in duties which took his eyes from the track. He insists he was looking ahead. The weather conditions were evidently good for observation at a distance, and the light pink dress of the child was favorable as a mark clearly to be seen. If the child was on the track, he could not assume that it would get off. That rule as to adults does not apply to irresponsible looking children. If the child was walking between the two great tracks of this railway line, it was likewise the duty of the engineer to take no risk in passing it with the swiftly moving machinery and cars. He was chargeable with knowledge that an infant in such a position is likely to become bewildered and to take a step to its injury. Even adults cannot safely stand near a rapidly moving train. Grease on the child's body and clothing indicated that it might have been struck by the sides of the engine or cars. We do not know how it came to

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injury. But pregnant is the fact that the child was on or very near the track when the train approached and that the engineer was derelict in not observing its danger and protecting it. That the train injured the child is certain. Why did not the engineer protect it, if he was looking ahead as he says?

[3] Clearly was it negligence to undertake to run a great fast train by this little boy, if the reasonable inference that the engineer undertook that risk is adopted. A cautious man would not do so. He would know that the excitement and confusion would, in a sense, blind the child and cause its fall to injury. To undertake to run by a child in such a place would seem quite as reckless as to rely on a child's leaving the track when on it ahead of an approaching train. The law does not permit the latter, nor will it justify the former. The certain danger because of the immaturity of the child affords the reason in either instance. It is not any particular position of the child that excuses the engineer from failure to stop. The probability of injury, though the child may be wholly off the track, must impel him to stop when circumstances reasonably indicate that injury may happen if he does not do so.

Now, as to the alleged negligence of the parents. It suffices to say that they have not been shown guilty of such negligence as would bar a recovery, even were we to approve the doctrine of imputed negligence, which defendant would have us apply. As to that doctrine we express no opinion. In this case "there was not that omission of ordinary care as persons of ordinary prudence deem adequate care with their children." *Gunn v. Railroad Co.*, *supra*.

On the demurrer to the evidence, the trial court properly adopted the inferences and conclusions most favorable to the party whose evidence was thereby taken from the jury. These inferences and conclusions were not overcome by any decided preponderance of probability and reason against them. The demurrer was rightly overruled, and judgment against the demurrant entered. The judgment will be affirmed.

SOUTHERN RY. CO. *v.* GRANT.

(Supreme Court of Georgia, May 11, 1911.)

[71 S. E. Rep. 422.]

Account, Action on—Pleading.—Where a suit against a corporation is brought on account, and an itemized statement thereof is attached to the petition, it is not necessary for the plaintiff to set forth

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in the petition the grounds upon which he contends that the defendant is liable to pay him the account.

Railroads—Special Agent—Authority—Notice—Medical Aid.—One dealing with a special agent is bound to take notice of the extent of his authority.

(a) A physician, who, under a written contract between him and a railroad company, is thereby employed to give first medical attention to persons injured in the operation of the road of the company, when ordered by it to attend them, but by the terms of the contract of employment is prohibited from admitting any such persons "to hospital or private quarters on account of the company without specific authority from the head of the department to which such injury is accredited, or some other officer of the company," in the absence of such authority cannot bind the company by contracting with a hotel keeper to furnish, on its account, board and lodging for such injured persons, or for those in attendance on them.

Principal and Agent—Railroads—Admissibility of Evidence—Authority of Agent.—Declarations of an agent are not admissible to prove his agency.

(a) The fact that the defendant, acting on the recommendation of the same physician, who, as claimed by the plaintiff, incurred the account with the plaintiff on which the present suit is brought, had on a previous occasion paid to the plaintiff the board of a person injured by the defendant, was an immaterial one, and proof thereof was inadmissible.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by B. W. Grant against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Robt. McMillan and A. G. & Julian McCurry, for plaintiff in error.

J. C. Edwards, for defendant in error.

HOLDEN, J. The defendant in error (hereinafter called the plaintiff) brought suit against the plaintiff in error (hereinafter called the defendant), alleging that the defendant was a corporation having an office and doing business in the county in which the suit was brought, and was "indebted to petitioner in the sum of \$123 on account, a copy of which is hereto attached and made a part of this paragraph and petition, and marked 'Exhibit A.'" The account attached to the petition was as follows: "Southern Railway Company, in Account with B. W. Grant, Prop'r Hotel Grant, Cornelia, Ga. To board for injured boys, Tom Brock and Gordon Logan, and for nurses, assistants, and doctors for the same, from March 16 to April 5, 1907. To one week's board for

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Gordon Logan \$10.00." Here followed other items, consisting of charges for board, for a specified time, for named persons, and the amounts respectively charged for the same, except that in two items the persons named were described as nurses, assistants, or physicians. A verdict was rendered in favor of the plaintiff, and to the order of the court refusing the defendant a new trial it excepted.

[1] 1. The defendant made a motion to dismiss the action, on the ground that the petition "contained no allegation showing any legal liability of the defendant for the payment of the account sued on, and that the pleadings did not set forth a prima facie case of liability of defendant for the payment of the account sued on." Exceptions pendente lite were filed to the ruling of the court overruling this motion, and error was assigned thereon in the bill of exceptions. The court committed no error in overruling the motion to dismiss the petition. The plaintiff had the right to bring the suit upon an account, attaching to his petition a bill of particulars or statement of the account, and to recover upon proof of an express or implied promise to pay the same. If, as in this case, this account be against a corporation, and it was not in fact incurred by it, or was incurred by one of its agents not authorized to bind it in that regard, there can be no recovery. If the account was incurred by some agent authorized to bind the corporation, but not its agent to make payment, it would be the duty of the agent to notify the proper authorities of the corporation to discharge it; and if the agent failed to so notify them, they would nevertheless be charged with knowledge of its existence, knowledge of the acts of an agent within the scope of his authority being in law imputed to his principal. Under either view, the corporation cannot require more specific pleading in a suit against it of this character than would be required of a plaintiff bringing a like suit against an individual defendant. It was unnecessary to set forth in the petition the grounds upon which the plaintiff claimed the defendant was liable to him on the account upon which the suit was brought. *Talbotton Railroad Co. v. Gibson*, 106 Ga. 229, 234, 32 S. E. 151; *Jackson v. Buice*, 132 Ga. 51, 63 S. E. 823; 1 Cyc. 778.

[2] 2. Upon the trial of the case, part of the evidence in favor of the plaintiff was substantially as follows: The plaintiff operates a hotel at Cornelia, Ga. On March 16, 1907, Gordon Logan and Tom Brock were injured on the railroad of the defendant, and were taken to the hotel of the plaintiff. Dr. Crawford, a physician residing in Cornelia, operated on one of them, and a short time thereafter they were removed by Dr. Crawford to the hotel of the plaintiff. Subsequently and during the same day Dr. Hathcock, the surgeon of the defendant, came to the hotel, and he and other physicians performed other operations on Brock and Logan. Dr. Hathcock contracted with the

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plaintiff to care for Brock and Logan, and to board and lodge the nurses and other persons attending them, and that the railroad would pay for the same. He boarded Brock, Logan, and others, under this agreement, and the account sued upon is for such board and lodging. "On the ——— day of ———, 19—," Hathcock notified the plaintiff that Brock had sued the railroad company, and that the latter would no longer be responsible for the board and lodging of Brock and of the others. Hathcock testified, upon the trial of the case, that he went to Cornelia to attend Brock and Logan by virtue of a message from the officers of the railroad company to do so; that he made no contract with the plaintiff on behalf of the company to board and lodge Brock and Logan, or any other person; that he had no authority to make such a contract; that under his contract with the railroad company his authority as surgeon or agent of the company was so limited that he had no authority to bind the company by virtue of any contract which the plaintiff contended was made; and that he made no such contract. The defendant introduced the contract between it and its surgeon, Hathcock.

The brief of evidence sets forth the following provisions of the contract as being the ones material to be considered: "Said contract, after being a contract entered into January 1, 1902, between the Southern Railway Company and Jiles Hathcock, as surgeon of said road, fixing the fees for service, and regulations governing said surgeons when employed by the Southern Railway Company, after fixing fees for service, provides as follows, to wit: In all cases of injury to employees, passengers or others, when first or temporary attention is ordered, first attention should be construed as authorizing the surgeon to control hemorrhages and relieve pain and shock, together with temporary aseptic and surgical dressing. The patient should then be turned over to his friends, or, in the case of tramps, to the authorities or charitable institutions. When temporary attention is ordered, no further expense will be incurred or paid by the company; and surgeons are requested to strictly comply with this rule. A surgeon is an agent of the company only after he has been properly called, and then limited as to such to the immediate necessities of the injury. When attention is rendered to persons not in the employ of the company, or in its employ and the accident be due to the carelessness of the person, the surgeon, after having been notified by the company that it does not hold itself responsible for any claim for damages sustained by such injured person, may present his bill for a reasonable sum for such attendance to such person for payment; but the company shall not be liable for the payment of such bill. No case of injury must be admitted to hospital or private quarters on account of the company without specific authority from the head of the department to which such injury is accredited, or some other officer of the company."

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There was other evidence introduced; but, under the view we take of the case, we deem it unnecessary to set forth the same.

There was no testimony to show that Hathcock was a general agent of the railroad company. The evidence shows that, when he was sent by the company to attend Brock and Logan (injured on its railroad), the written contract between him and the company was in force. This contract shows that Hathcock was a special agent of the company when he rendered services for it to the injured parties. Under this contract, "without specific authority" from one of those referred to in the contract, he had no authority to make a contract by which the company would be bound to pay for the board and lodging of the injured persons, or of any one nursing or otherwise rendering them services in a "hospital or private quarters." By the express terms of the contract such authority was denied him. The contract provides: "No case of injury must be admitted to hospital or private quarters on account of the company, without specific authority from the head of the department to which such injury is accredited, or some other officer of the company." No officer of the company, specially or otherwise, authorized any one to admit either of the injured parties "to private quarters on account of the company," nor did the head of any department do so. If Hathcock made the contract with Grant which the latter testified he made, he had no authority to do so; and the evidence does not show that such a contract, if made, was ratified by any agent or officer of the company. It is well settled that any one dealing with a special agent is bound to take notice of the extent of his authority. *Inman v. Crawford*, 116 Ga. 63, 42 S. E. 473; *American Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780. In this case Hathcock was a special agent of the company, without authority to bind the company by any agreement that the company would pay for the board and lodging of the injured parties, or any one serving them, and Grant was bound to take notice of the lack of such authority. If Hathcock made such an agreement, the company was not bound by it. In 2 Cyc. 1044, it is said: "A railroad physician or surgeon, employed by the corporation to render professional services to its servants or other persons injured in the operation of the road, cannot, in the absence of express authority, engage the services of others at the expense of the company to attend such injured persons or furnish them with the necessary supplies." See *Central of Ga. Ry. Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579; *Mayberry v. Chicago, R. I. & P. Ry. Co. (Mo.)* 11 Am. & Eng. R. R. Cases, 29, and cases cited in note on page 30; 1 Elliott on Railroads, §§ 222-225.

The ruling we make does not conflict with the decisions, referred to in 2 Cyc. 1044, and 1 Elliott on Railroads, § 222, to the

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effect that subordinate officers or agents of a railroad company are clothed with the powers of the corporation itself for the purposes of meeting an immediate emergency when a person is injured on the road, nor with the principle that an agent's authority will be construed to include all necessary and usual means for effectually executing it. The record does not show that the company held Hathcock out as its agent authorized to make the agreement which Grant says he made, or that he was apparently acting within the scope of his authority in making such contract, if he made it. The evidence shows that Hathcock was a special agent, and, if he made such an agreement, in doing so he was acting without the scope of his authority and the company is not bound by it. The court erred in refusing the written request of counsel for the defendant to give certain instructions to the jury, which request was properly constructed and was in conformity to the principles above announced. The charge of the court of which complaint is made in one ground of the motion for a new trial was not in accord with the ruling herein made, and was error.

[3] 3. Complaint is made that the court erred in admitting the following testimony of a witness for the plaintiff: "I had a conversation with Dr. Hathcock about Tom being here at the Grant Hotel. He told me that he was an agent of the Southern Railway. I don't know as I can say in what capacity; he said he was a railroad agent or doctor for the railroad." It was error to admit this testimony, as the fact that one is agent for another cannot be proved by the declarations of the former.

Complainant is also made that the court erred in admitting the following testimony of the plaintiff: "The Southern Railway paid the expenses of Addison staying at my house at the time he was hurt." It appears from the testimony that, before Brock and Logan were injured, one Addison was injured, and was taken to the hotel of the plaintiff, who was paid for boarding him by the defendant on the recommendation of Hathcock after he left the hotel. This testimony was irrelevant, and should have been excluded. There was no effort to show, nor any contention, that it was the custom of the company to pay for boarding persons injured by it, and those attending them, or that it had ever done so, except in the instance above referred to, where Addison was injured by the company, and it paid his board upon the recommendation of Hathcock.

Judgment reversed. All the Justices concur.

CENTRAL TRUST CO. OF NEW YORK *v.* THIRD AVE. R. CO. *et al.*

(Circuit Court of Appeals, Second Circuit, March 13, 1911.)

[186 Fed. Rep. 291.]

States—Claims—Preference.—The state does not succeed as sovereign to all the prerogatives of the British crown, among others the right to a preference for debts due it over other creditors.

Taxation—Priority—Prior Mortgage.—Tax Law (Consol. Laws 1909, c. 60) §§ 185, 197, giving the state a lien on a street railroad company's property for a tax on certain dividends, does not give the state priority over a prior mortgage.

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Action by the Central Trust Company against the Third Avenue Railroad Company and others. From an order on a claim by the people of the State of New York, they appeal. Affirmed.

Thomas Carmody, Atty. Gen. (W. A. McQuaid, Deputy Atty. Gen., of counsel), for the People of New York.

Everts, Choate & Sherman (H. J. Bickford and M. S. Borland, of counsel, for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. In 1907 the Third Avenue Railroad was being operated by the New York City Railway Company as lessee and was subject under section 185, c. 908, Laws 1896, re-enacted in section 185 of the tax law (chapter 62, Laws 1909 [chapter 60, Consol. Laws 1909]), to a tax of 3 per cent upon its dividends in excess of 4 per cent for the privilege of exercising its corporate franchise or carrying on its business. It was also required under section 192 to make a return on or before August 1, 1907, of the amount of these dividends during the year ending June 30th, and section 197 made the tax due and payable August 1st, and further provided that it should be a lien upon the company's real and personal property "from the time when it is payable until the same is paid in full." This particular provision in the tax laws appeared for the first time in section 194 of the old tax law (chapter 908, Laws 1896). September 24, 1907, after this tax had become due and payable, receivers were appointed of the New York City Railway Company, who operated the property until January 12, 1908, when they turned it over to a receiver appointed for it January 6, 1908. The Third Avenue Railroad Company was subject to a mortgage executed by it to the Central Trust Company, as trustee, May 15, 1900, and in an action foreclosing the mortgage a decree was entered

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May 17, 1909, against the railroad company for \$40,381,173.33. March 1, 1910, the railroad was sold for \$26,000,000. The state of New York now claims a priority over the mortgage for the taxes for 1907 under section 185 of the tax law, amounting to \$2,543.33.

[1] We regard it as settled law in this state that the state does not succeed as sovereign to all the prerogatives of the British crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the state have no priority of payment out of a fund in court for distribution, unless the priority was expressly given by statute, or unless the fund has come into court impressed with a priority for the tax. *Wise v. Wise Co.*, 153 N. Y. 507, 47 N. E. 788. O'Brien, J., said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition. In support of his contention he has called our attention to various authorities in England and in this country. *Giles v. Grover*, 9 Bing. 130-285; 2 Bac. Abr. p. 363; *Toller on Ex. c. 2*, p. 259; *In re Columbian Ins. Co.*, 3 Abb. Dec. 239; *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; *Union Trust Co. v. I. M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *U. S. v. State Bank of North Carolina*, 6 Pet. 29-34, 8 L. Ed. 308. The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

"On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or the trustee of an insolvent person or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. The prerogatives of the crown with respect to the imposition and collection of taxes was the subject of a long and obstinate dispute in England between the people and the executive. Without attempting to ascertain whether the limits of this prerogative have ever been judicially

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defined with anything like precision, it is entirely safe to say that many of the utterances of the English courts on the subject to be found in the books cannot be considered law here, or even in that country. The great contest with respect to the right of the sovereign to levy and collect what was called 'ship money' illustrates the extent to which the claim of prerogative was pushed, the nature of the dispute, and the conflicting views of the judges. 3 Howell's State Trials, 826-1254.

"In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases: (1) Where the preference is expressly given by statute as was the case in *U. S. v. State Bank of North Carolina*, supra. (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection, as was the case in the *Columbian Ins. Co. Receivership*, 3 Abb. Dec. 239. But where there is no statute giving the preference, and no warrant or process has been issued for the collection of a tax on personal property, there is no controlling authority for preferring such a claim over specific prior liens in favor of creditors obtained by levy under attachments or executions. *Roraback v. Stebbins*, 4 Abb. Dec. 100."

[2] In this case a lien upon the company's real and personal property, taking effect from August 1, 1907, was expressly given by section 197 of the tax law. The question is whether the section also gave that lien a priority over claims of all other creditors. Most of the New York cases cited as to taxes due the state are not applicable, because they were incurred before the provision making them a lien was enacted in 1896. Undoubtedly the state has power to confer the priority, but such a construction of the act should not be adopted unless the language used compels it. The fact that, though the tax is for the whole year, it is not given a lien until it is payable, viz., August 1st, is some indication that it is subject to liens arising before that date. This is consistent with the general principle applicable to liens: "*Qui prior in tempore est potior in jure.*" In the absence of unmistakable intention to do otherwise, we think it fair to suppose that the Legislature intended to make the tax a lien on the property in its then condition. We discover no equity to induce a contrary construction in imposing the burden of making the state's loss good upon one person rather than upon the citizens at large.

It is contended, however, that this priority necessarily follows from the provision of the statute that the taxes are to remain a lien until they are paid in full. It was so held by the Supreme Court of Pennsylvania in *Eaton's Appeal*, 83 Pa. 152. But we think the provision as consistent with an intention that the taxes

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shall remain a lien as to the property in question and its proceeds against all subsequent lienors and general creditors until paid, and perhaps with an intention to rebut the common-law presumption of payment after the lapse of 20 years (*Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153), as with the intention that the lien shall never be displaced until the taxes are paid. The statute which makes taxes a prior lien upon real estate in the city of New York (section 1017 of the charter of Greater New York [Laws 1901, c. 466] taken literally from the consolidation act of 1882) does show this intent clearly by providing that they shall "continue to be until paid a lien thereon and shall be preferred in payment to all other charges."

The Circuit Court of Appeals for the Eighth Circuit, in *State v. Central Trust Co.*, 94 Fed. 244, 36 C. C. A. 214 (certiorari denied 174 U. S. 803, 19 Sup. Ct. 883, 43 L. Ed. 1188), held the state of Minnesota to be entitled to priority of payment, even out of personalty, of all debts due it over every other debt. This conclusion was rested upon the rights of Minnesota as a sovereign, without reference to statute, which, as we have seen, is not the law of this state.

We are also referred by the Deputy Attorney General to section 203 of the tax law, which authorizes, in an action brought by the Attorney General, the forfeiture of the franchise of any corporation which intentionally fails to pay its taxes; but it contains nothing to change our conclusion as above stated. The forfeiture of the Third Avenue Railroad Company's franchise would not affect in any way the distribution of its assets among its creditors. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

The order is affirmed.

NOYES, Circuit Judge (dissenting). Concededly the state had the power to make the tax in question a lien on the corporation's property and to give it priority over other liens. The only question is whether it has done so. The law provides:

"Such tax shall be a lien upon and bind all of the real and personal property of the corporation, joint stock company or association liable to pay the same from the time when it is payable until the same is paid in full."

This provision expressly makes the tax a lien. It does not expressly give the lien priority; but that, in my opinion, necessarily results from the provision that it shall bind the property of the corporation "until the same is paid in full." A lien cannot bind property until a tax is paid in full, if, without being paid at all, it can be wiped off by the foreclosure of a prior mortgage. The construction placed upon this provision by the opinion of the majority deprives it of all practical efficacy. It is wholly unnecessary to say that, as against subsequent lienors and general creditors, the lien shall remain until paid. And, assuming that

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the 20-year presumption of payment applies to taxes, the possibility that the Legislature had it in mind in making this enactment is very remote.

It must be borne in mind that we are not dealing with conventional liens, in which the parties cannot by any stipulations affect the rights of prior lienors. We are dealing with a demand of the government, which the government has the right to make a charge upon the property, and to which charge it may give priority. And in my opinion the provision in question was intended to accomplish that result, is appropriate for the accomplishment of that result, and must be erroneously limited in scope not to accomplish that result.

I think that the order should be reversed.

WILLIAMS *et al.* v. JOHNSON *et al.*

(Supreme Judicial Court of Massachusetts, Suffolk, May 16, 1911.)

[95 N. E. Rep. 90.]

Railroads—Corporate Powers.*—The proprietorship of a real estate business by a railroad company is not within its corporate powers.

Corporations—Corporate Powers.*—A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other.

Railroads—Corporate Powers.*—A railroad company, holding lands to be disposed of as no longer available for railroad purposes, cannot hold the land permanently or for an unreasonably long time as an investment; nor does its ownership thereof give it the right to carry on for a long term of years the business of dealing and speculating in land.

Corporations—Corporate Powers—That which a corporation cannot do directly, because not within its corporate powers, it cannot do indirectly through the appointment of trustees.

Railroads—Corporate Powers.*—In disposing of its unused land, a railroad company can do nothing more than what is fairly incidental to a reasonable disposition of the property for its fair market value within a reasonable time.

Railroads—Corporate Powers.—The fact that a railroad, seeking to dispose of unused land, has not been able to sell it for its estimated value on account of risks attending the development and use of the property, which diminish the price, will not justify the directors in putting such risks on the stockholders, by creating a

*For the authorities in this series on the subject of the ultra vires acts and contracts of railroad companies, see foot-note of National Car Ad. Co. v. Louisville & N. R. R. Co. (Va.), 33 R. R. R. 179, 56 Am. & Eng. R. Cas., N. S., 179.

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trust for the purpose of carrying on the business of developing and using the property for profit.

Corporations—Corporate Powers—Purchase of Stock in Other Corporation.—A deed by a railroad company, conveying unused land to trustees, who are authorized to acquire shares in other corporations in disposing of the property as contemplated by the deed, is void, as violating St. 1906, c. 463, pt. 2, § 57, forbidding the holding by a railroad corporation of the stock of other corporations.

Railroads—Corporate Powers.—A deed by a railroad company, conveying its unused land to trustees, who are authorized to issue stock in developing this and other land acquired by them in carrying out a scheme for disposing of the property, is invalid, as creating a partnership between the corporation and parties who may be brought into the enterprise.

Corporations—Corporate Powers—Partnership.*—A corporation cannot enter into a partnership.

Petition by Moses Williams and others, as trustees, for the registration of title to land conveyed by a railroad company of which the respondents Lawrence H. Johnson and others are stockholders. Dismissed.

Warren, Garfield, Whiteside & Lamson, for petitioners.

Henry Wheeler and Charles S. Rackemann, for respondents.

KNOWLTON, C. J. [1] This is a petition for the registration of the title to a tract of land in Boston, a part of which was formerly occupied as the station of the Boston & Providence Railroad Company, at Park Square. The diversion and extension of the railroad and the erection of the terminal passenger station in Boston under St. 1896, c. 516, rendered the property no longer available for railroad purposes, and it was conveyed by this corporation to the New York, New Haven & Hartford Railroad Company in consideration of improvements made by the grantee upon the property of the grantor, in connection with the location and erection of the new station. The validity of this conveyance was confirmed in *Little v. Old Colony Railroad Co.*, 202 Mass. 277, 88 N. E. 896. The petitioners claim title under a deed from the New York, New Haven & Hartford Railroad Company, bearing date September 15, 1909. The respondents, who are stockholders in the last-mentioned corporation, deny the validity of the deed, on the ground that it was ultra vires of the corporation and that the directors had no authority to make it.

The deed runs to the petitioners as trustees under a declaration of trust. The consideration expressed in it is one dollar and other valuable considerations. The conveyance is "subject to and upon the terms, provisions and trusts mentioned and set forth in the aforesaid declaration of trust." This declaration is

*See foot-note on preceding page.

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of a peculiar kind. It provides that the trustees shall forthwith issue to the grantor certificates, in a form prescribed, for 52,000 shares, of a nominal par value of \$100 each, in payment for this real estate. The entire interest of the cestuis que trust, or shareholders in the property, was to be represented, immediately after the conveyance, by these shares. The trustees were authorized to issue not exceeding 40,000 additional shares of the same nominal par value, in exchange for convertible notes or bonds that the trustees may issue to obtain money to be used in conducting the enterprise. The shares are transferable on the books of the trustees. The shareholders are not to have any legal title to the trust property itself, real or personal, and especially they are not to have a right to call for any partition. It is declared that they shall have no equitable estate in the lands and appurtenances constituting the trust property, but their interest shall consist only of an interest in the money to arise from the sale or other disposition thereof by the trustees, and, previous to such sale, in all the rights mentioned in the declaration, which are rights "of division of proceeds and profits, and the other rights and matters concerning the trust property."

The death of a shareholder is not to determine the trust, nor entitle his legal representatives to an accounting, but his rights are to pass to his executors, administrators or assigns, upon the surrender of the certificate of the shares. The trustees may from time to time invite and receive subscriptions to additional shares, for the purpose of increasing the capital of the trust, giving preference, upon such terms and conditions as they shall deem best, to existing shareholders, and to the holders of convertible notes or bonds. The trustees have no power to bind the shareholders personally for any debt, nor are the trustees to be personally liable for claims or debts against the trust, but all persons extending credit to the trustees are to look only to the property of the trust for their payment. The trustees have no pecuniary interest in the property of the trust or in the business carried on under the trust, except for the payment of prescribed commissions upon receipts and expenditures, as compensation for their services.

The trustees are to have absolute control over and disposal of all real estate and other property held under the trust, including the power to improve it by building thereon or otherwise; to sell, for cash or credit, at public or private sale, any part of the property; "to lease or hire for improvement or otherwise, for a term beyond the possible termination of the trust, or for any less term; to let, to exchange, to release and to partition." They have power to borrow money to carry out the purposes of the trust, to issue notes or bonds and to secure the repayment of them by a pledge, mortgage or hypothecation of the property of the trust, or any part of it. The only limitation upon the power to borrow is that the total indebtedness at any time shall not exceed

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four million dollars. Notes or bonds issued for such indebtedness may be made convertible into shares of the trust.

The trustees may acquire, by purchase or otherwise, any real estate or any interest therein in the general vicinity of that conveyed by the deed in question, "and any notes, bonds, shares or other securities of any corporation, association or real estate trust, organized or adapted for the purpose of acquiring, holding, managing or improving real estate, or for the purpose of conducting a lighting, heating, power or other business directly related to the management of real estate, if, in their judgment, such acquisition will in any manner tend to facilitate the laying out, development, management or improvement of the real estate" conveyed to them by the deed in question. They may lay out and construct or discontinue streets or ways, upon any property at any time held by them. They may dedicate to public use, or convey to the city of Boston, with or without compensation, any part of the property, with a view to the enhancement of the value of the remaining property. For a like purpose they may contribute money or other property to the cost of any public or quasi public undertaking. In all these matters the judgment and determination of the trustees is to be final and conclusive.

They may from time to time determine what of their receipts and expenditures shall be treated as capital and what as income, and their determination shall be final. They may divide net income among the shareholders, under certain limitations, and may set aside a part of the net income as a reserve or contingent fund. Their determination of what is net income is to be conclusive. The trust is to continue until the expiration of 20 years from the death of the last survivor of nine persons named, some of whom, presumably, are quite young, unless three-fourths in value of the shareholders shall appoint an earlier time for its termination, not earlier than the 2d day of July, in the year 1919, by an instrument in writing duly signed and acknowledged. After the termination of the trust by its own limitation, or by such an appointment of three-fourths of the shareholders, the proceeds are to be divided among the shareholders. The trustees, when vacancies occur in their number, may appoint their own successors.

By this conveyance and the accompanying declaration of trust, the New York, New Haven & Hartford Railroad Company set on foot a scheme to put property, of an estimated value of more than \$5,000,000, into the hands of trustees as managing agents, who were appointed irrevocably, to conduct a business for a term that might last nearly a century, with practically all the powers of an absolute owner, not only over the property conveyed, but for the acquisition of other real estate in the neighborhood, and of shares in corporations which have relation to the use, management and improvement of real estate. The scheme contemplates the borrowing of money to create an indebtedness not ex-

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ceeding \$4,000,000 at any one time. It contemplates an unlimited extension and enlargement of the enterprise, in the discretion of the trustees, by the issue of additional shares to persons who subscribe for them. It contemplates a real estate business, if not a speculation, that may continue a long time and become gigantic, of which the railroad corporation is now the sole owner. It needs no argument to show that, ordinarily, the proprietorship of such a business, by a railroad company as a beneficiary, is not within its corporate powers.

[2] As was said in *Davis v. Old Colony Railroad Co.*, 131 Mass. 258, 259, 41 Am. Rep. 221: "A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership; but with such only as its charter confers." In *Waldo v. Chicago, St. Louis & Fond du Lac Railroad*, 14 Wis. 575-581, we find this language: "When a corporation, created for the purpose of building and operating a railroad, goes into the business of banking, or manufacturing and selling goods, or dealing and speculating in real estate, because its corporators or board of directors think such adventures may be profitable, or if a bank should go to building and operating a railroad for like reason, it is easy to see that, in each instance, the corporation is attempting to transact business which, under its organic act, it has no right or power to do. And if the corporation might embark in a separate and distinct business not contemplated by its charter, merely because it was supposed it would be profitable, and increase its means and resources, there would be no safety to the public in granting any special charters, and none to individuals who might invest in the stock of the company." The following are a few among the many other cases that apply the same doctrine: *Attorney General v. Great Northern Railway*, 1 Dr. & Sm. 154; *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; *Pacific Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *State v. Southern Pacific Co.*, 52 La. Ann. 1822, 28 South. 372; *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *People v. Pullman Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *Slater Woolen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823.

If the railroad company had taken its money and purchased land, and had applied it to a use like that contemplated by this scheme, no one would contend that it was acting within the law. We are left with only the question whether its ownership of this real estate justifies its creation of such an enterprise.

[3] Its ownership of the land, which came to it legitimately, left it with the property on hand, to be sold or disposed of, so that its proceeds could be properly used for the purposes for

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which the corporation was created. It did not give it the right to hold the land permanently, or for an unreasonably long time, as an investment for the production of income; much less did it give it the right to carry on, for a long term of years, the business of speculating in land, or developing this and other land in the vicinity, and changing its general character, for the purpose of gain. [4] If the corporation could not do this directly, it could not do it indirectly through the appointment of trustees or agents who should continue the business for its benefit. *Attorney General v. New York, New Haven & Hartford Railroad Co.*, 198 Mass. 413, 84 N. E. 737.

The objection to such a venture on the part of a corporation is two-fold. On the part of the state it is that the corporation is usurping powers which were never conferred upon it, and is engaging in a business which the Legislature has not authorized it to do, and to which there may be grave objections on grounds of public policy. The trustees are managing for this corporation, as the beneficiary, a large amount of valuable real estate in the heart of Boston, and are authorized, in the interest of the beneficiary, to make donations of land or other property for public purposes, or to convey it to the city of Boston with or without compensation, to lay out and construct or discontinue streets, and become the owners of corporations engaged in other kinds of business relating to real estate, even in remote parts of the city. There may be grave reasons connected with the public interest why such powers should not be exercised in a city, and, incidentally, an influence possibly be exerted in behalf of a railroad corporation. At all events, the Legislature has never seen fit to authorize their exercise. Corporations for the holding of real estate for purposes of profit have always been deemed objectionable, and the laws of this commonwealth do not permit the organization of such corporations.

The other objection is from the side of the stockholder in the corporation. He invests his money by subscribing for the shares of stock, with a knowledge of the purpose for which the corporation is organized, and with a view to the probable gain, and a thought of the possible loss, that may result from the transaction of the business of the corporation. He does not invest in any other kind of enterprise than that which is within the authority conferred upon the corporation. His protection requires that the company be confined strictly to the business and functions for which it was organized. It would leave him without compass or rudder in making his investment, if the managing officers, or a majority of the stockholders, could use the corporate property in a business foreign to that for which the company was established.

[5] In turning this real estate into money, the railroad company should not be held too strictly to sales to be made at once,

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and without expenditure for changes and improvements that would increase its marketable qualities. A reasonable latitude in that respect is fairly incidental to ownership with a right to sell. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. But nothing more than what is fairly incidental to a reasonable disposition of the property for its fair market value, within a reasonable time, is permissible.

The only debatable question in this case is whether such a scheme as has been devised is incidental to the right to sell, and reasonably necessary to enable the corporation to obtain the fair market value of the property. We are of opinion that it is not.

[6] The reasons relied on by the petitioners for adopting the scheme, as given in the statement of agreed facts, are that "earnest efforts, during several years, were made, without success, to sell the same and convert it into cash; but the risks and uncertainties attending the development and use of so large a tract of land, without streets or other facilities for its development, were such that no purchaser was in fact found, and no purchaser seemed likely to be found willing and able to purchase said property, except at a price so low as to indemnify him against all such risks and uncertainties, and much below the estimated real value of said land." This is, in substance, that the directors have not been able to sell the land for its estimated value, and that there are risks and uncertainties attending the development and use of the land, which a purchaser would take into account in determining what price he would pay for it. The directors decided to put these risks and uncertainties upon the stockholders of the corporation, by providing for a business of developing and using this property for many years, in the belief, doubtless, that the business would be more profitable than a sale to others who would assume the risks of such a business. This is not very different from taking \$5,000,000 in money of the corporation, if that amount happened to be on hand, and if land could be bought for its fair market value, and investing the money in such an enterprise, in the expectation that the assumption of these risks and uncertainties, in buying at a price diminished on account of them, would open a large field for profit in the business of developing and using the property.

The conveyance to the trustees merely changed the form of the property. It did not bring a dollar to the treasury of the corporation. If the trust were sustained, it might or might not be possible, at some time, to sell shares at their estimated value instead of selling portions of the land. But presumably, there will be no satisfactory market for any of these shares, unless and until it is demonstrated, after a considerable time, that the business is likely to prove profitable.

[7] In addition to the general objections already stated to such a venture on the part of a railroad corporation, there are special objections. If stock is purchased by the trustees in other corporations, this corporation will become indirectly a

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holder of the stock of those other companies, in direct violation of St. 1906, c. 463, pt. 2, § 57, which expressly forbids the directly or indirectly subscribing for, taking or holding, by a railroad corporation, of the stock or bonds of any other corporation. *Atty. Gen. v. N. Y. N. H. & H. R. R.*, 198 Mass. 413, 84 N. E. 737. In *Williams v. Boston*, 94 N. E. 808 (Suffolk, April 4, 1911), it was decided that the certificate holders in such a trust are partners within the meaning of that word in St. 1909, c. 490, pt. 1, § 27.

[8] Moreover, if other stock is issued by the trustees, and other parties are bought into the enterprise, and other lands are bought, the railroad corporation will be in a community of interest in the profits and losses, and in all the activities of the business, with other owners. It will be virtually, if not technically, in partnership with them. [9] It is familiar law that a corporation cannot enter into a partnership. *Whittenton Mills v. Upton*, 10 Gray, 582, 71 Am. Dec. 681; *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; *Burke v. Concord R. R.*, 61 N. H. 160; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 174, 40 S. W. 837; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843. Most of the reasons for this rule are as applicable to the present case as to an ordinary partnership. They are strongly stated in the first and last of the cases just cited. Through the trustees, who represent the interests of new shareholders as well as those of the creator of the trust, the rights and interests of the railroad corporation are controlled in part for those who are not members of it or peculiarly interested in it.

In the decision in *Kelly v. Biddle*, 180 Mass. 147, 61 N. E. 821, cited by the petitioners, it was assumed that the arrangement, only for a temporary purpose, might have been ultra vires of the corporation.

It is the duty of a railroad corporation holding real estate under such circumstances as exist in this case, to dispose of it and turn it into money with all reasonable dispatch, and in view of such circumstances it may take all action necessary to realize from it, so far as possible, its fair value. We do not attempt in the present case to prescribe the precise limits of the authority of a corporation for the accomplishment of this end. These must depend upon existing conditions. Some liberality should be exercised in allowing a choice of methods where the amount involved is large and the conditions complicated.

We are of opinion that the deed of the New York, New Haven & Hartford Railroad Company to the petitioners was beyond the power of the corporation or the directors to make, and that the petitioners took no valid title under it.

Petition dismissed.

CITY OF PITTSBURG v. PITTSBURG & C. ST. RY. Co. et al.

(Supreme Court of Pennsylvania, Jan. 3, 1911.)

[79 Atl. Rep. 235.]

Street Railroads — Franchise — Construction. — A street railway, having a franchise to operate cars on the streets of a city, may operate, not only its own cars, but those which are the property of the company which it has leased.

Equity—Pleading—Amendment of Bill—Time.—An amended bill cannot be filed five months after final decree dismissing the original bill.

Appeal from Court of Common Pleas, Allegheny County.

Bill by the City of Pittsburg against the Pittsburg & Charleroi Street Railway Company and the Pittsburg Railways Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Evans, J., stated the facts to be as follows:

"The plaintiff in its bill alleges that it and the two defendants are corporations, the former a municipal corporation, and the latter corporations for the operation of street railway lines. It alleges that the Pittsburg & Charleroi Street Railway Company was leased to the United Traction Company on January 1, 1902; that the United Traction Company was leased to the Pittsburg Railways Company on January 1, 1902, and that the cars of the United Traction Company are operated under said lease by the Pittsburg Railways Company; that the cars of the Pittsburg & Charleroi Street Railway Company are operated by electricity over a route through various townships and boroughs, through the counties of Allegheny and Washington, and on various streets in the city of Pittsburg, crossing the Smithfield Street bridge in the city of Pittsburg, along Smithfield street to Liberty avenue, along Liberty avenue to Eleventh street, and then returning by the same route to the southern end of the Monongahela bridge; that these cars are also operated over a portion of the route of the Sycamore Street Railway Company, which company is now operated by the Pittsburg Railways Company, and to which company an ordinance of the city of Pittsburg was granted on May 15, 1899, providing for the crossing of the Smithfield street bridge; that the Pittsburg & Charleroi cars are operated over the old Pittsburg & Birmingham Passenger Railway, which is now operated by the Pittsburg Railways Company, and to which an ordinance of the city of Pittsburg was granted on August 29, 1859, and by various subsequent ordinances the right was given to the Pittsburg & Birmingham Passenger Railway Company and its successor, the Pittsburg & Birmingham Traction Company; that the Pittsburg Railways Company is also operating a line of cars, known as the 'Carrick

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line,' over the tracks and by various lines now operated by the Pittsburgh Railways Company from the borough of Carrick, through the boroughs of Mt. Oliver and Knoxville, through what is known as the 'tunnel route,' and across the Smithfield Street bridge, Third avenue, Wood street, and Water street, in the city of Pittsburgh; that the said line has been operated by the Pittsburgh Railways Company since about December 1, 1908, without the consent or authority of the city of Pittsburgh to operate its cars as herein stated; that the Pittsburgh Railways Company has never obtained the consent of the city of Pittsburgh to operate the cars of the Pittsburgh & Charleroi Street Railway over the streets designated in paragraph 5 of said bill, nor has it obtained the consent of the city of Pittsburgh to operate a line of cars to Carrick over the streets designated in paragraph 9 of said bill; nor has the Pittsburgh & Charleroi Street Railway Company obtained such consent or authority."

The defendants demurred to the bill, alleging: (1) That the alleged causes of action set forth and the relief asked against the different defendants are distinct and separate, and the bill is multifarious. (2) That the bill discloses no equity against the defendants, or either of them. (3) That it does not appear by the averments of the bill that the operation of the cars therein mentioned is unlawful.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. Elmer Bown, C. A. O'Brien, and C. K. Robinson, for appellant.

David A. Reed, for appellees.

PER CURIAM. To sustain this bill would be, in effect, to hold that the Pittsburgh Railways Company can use no cars but those owned by it in exercising its franchise to run cars over the streets of the city of Pittsburgh. When cars owned by the Pittsburgh & Charleroi Street Railway Company reach the tracks of the Pittsburgh Railways Company, and are operated over those tracks by that company in the city of Pittsburgh, they become its cars for all practical purposes. It can make no difference to the city that it does not actually own the cars which it uses, nor where it gets them; for, as just stated, all cars operated by its employees on the streets of the city are, so far as the city and the public are concerned, its cars, and the bill was properly dismissed on the demurrer to it.

More than five months after the final decree dismissing the bill was filed, the city presented a petition asking leave to file an amended complaint. This was a most unusual application, and all that need be said about it is that we know of no precedent or authority that would have justified the court in entertaining it.

Decree affirmed, at appellant's costs.

SPRINGFIELD & N. E. TRACTION CO. v. WARRICK *et al.*

(Supreme Court of Illinois, April 19, 1911.)

[94 N. E. Rep. 933.]

Railroads—Grant of Right of Way—Construction—Conditions Subsequent.—A condition in a deed of a railroad right of way that, if the grantee should fail to construct and continuously operate the proposed railway as to one track within two years between two points on its line, then the land granted should revert back to the grantors without repayment of the consideration, was a condition subsequent.

Railroads—Grant of Right of Way—Construction—Covenants—Breach—Remedy.—If conditions in a deed of a railway right of way providing for completion of the line within a certain time and for the construction of a crossing were covenants, a breach thereof would not entitle the grantors to a re-entry upon the land; their remedy being an action for damages for breach of covenants.

Railroads—Grant of Right of Way—Conditions Subsequent—Breach—Forfeiture.*—A deed to a railway right of way provided that, if the grantee should fail to construct and continuously operate the proposed railway within two years between two points on its line, the land conveyed should revert back to the grantors; the object of the stipulation being to secure the construction of the road and prevent the use of the land for other purposes. The road cost \$1,000,000, and by far the greater portion of it had been expended and substantially all the work, except overhead construction, completed before termination of the two-year period; the failure to complete the work being caused by delay in procuring materials and not from the negligence or indifference of the grantees. Notice of forfeiture was not given by the grantors until about a month and a half after expiration of the two-year period, and between those dates a large amount of work was done and a large sum of money expended in completion of the work on the land granted, with knowledge of the grantors. The work was completed about three months after termination of the period stipulated, and trains over the line were operated continuously as contemplated, so that the purpose for which the land was conveyed was accomplished substantially in accordance with the conveyance. Held, that a forfeiture would be inequitable and will not be enforced in equity.

Equity — Forfeitures — Relief — Possibility of Compensation in Money.—In equity, the harsh remedy of forfeiture yields to compensation when fair dealing and good conscience seem to require it, and, where the compensation can be made in money, such relief

*For the authorities in this series on the subject of the forfeiture of a railroad right of way for failure to comply with the conditions of the grant, see foot-note of *Treat v. Detroit United Ry.* (Mich.), 33 R. R. R. 431, 56 Am. & Eng. R. Cas., N. S., 431.

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gers. "And in case said grantee shall fail to construct, build and continuously operate said proposed railway as to one track within two years from Springfield to Lincoln, or shall fail to keep and perform any of the terms and conditions imposed in this deed as therein provided, which are hereby made a part of the consideration thereof, then the strip or piece of land herein conveyed shall revert back and become the property of the grantors without the repayment of the sum of money above mentioned, which shall be retained by the grantors." The road was not completed or electric cars put in operation between Lincoln and Springfield until December, 1906. Appellants served appellee with written notice of forfeiture on account of the failure to construct, complete, and continuously operate the road within the time provided in the deed and demanded immediate possession of the premises on November 14, 1906, and again on December 14th of the same year. This demand not being complied with, appellants, at the May term, 1907, of the Logan county circuit court, brought suit in ejectment to recover the land described in the deed, averring that the deed had been forfeited by reason of failure to comply with its provisions. This bill was thereupon filed to enjoin the prosecution of that suit and the forfeiture of the deed.

The proof shows that the chief part of the work of the construction of the road had been completed prior to September 30, 1906, and construction cars were running on that section between Lincoln and Springfield by steam power; the overhead work not yet being completed. It further shows that the delay in the completion of the work was caused partly, if not entirely, as a result of the failure to procure material for overhead construction; that this material was ordered in ample time, but it was delayed to some extent by scarcity of material on the market, though principally by delay in transportation, for which neither appellee nor its agents were in any way responsible. The decree finds, and the weight of the evidence supports the finding, that the original company, the grantee in the deed, during the years 1904, 1905, and 1906 made substantial efforts, in good faith, to build the road within the time mentioned in the deed; that it met with financial embarrassments and unavoidable delays and disappointments in borrowing money, and transferred its property and rights to appellee for the purpose of having the road completed within the time required; that the total cost of the work done by appellee between October 1, 1906, and the first notice of the forfeiture, between Lincoln and Springfield, was approximately \$50,000; and that as soon as the rails were laid on the land here in dispute a suitable and safe farm crossing, with approaches thereto, was constructed for appellant. The construction of the road was not completed until some two months after September 30, 1906. From this record there can

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be little doubt that it would have been completed within the time agreed but for various delays not due to the negligence or fault of appellee or its agents in charge of the work of construction.

[1] Appellants contend that the time fixed in the deed was intended to be, and was, of the essence of the contract, and that to entitle appellee to be relieved from the forfeiture it must be shown the failure to complete the work was the result of fraud, accident, or mistake. Appellants speak of the provisions of the deed as covenants. We are disposed to hold that the estate created by the conveyance was upon a condition subsequent, and the appellants must have so regarded it when they declared a forfeiture and brought the ejectment suit.

[2] If the conditions in the deed were covenants, it would not have entitled them to a re-entry upon the land; but they would have had a right of action for damages for a breach of covenants. *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, and note, 12 Am. St. Rep. 809; 2 Elliott on Railroads, § 945; 6 Am. & Eng. Ency. of Law (2d Ed.) 503. Forfeitures will be enforced by courts in clear cases, but they are not regarded with favor, and their prevention is within the protecting care of equity whenever wrong or injustice will result from their enforcement. *Palmer v. Ford*, 70 Ill. 369; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *Voris v. Renshaw*, 49 Ill. 425; *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641.

[3] It must be conceded that all of the conditions in the deed were not strictly complied with in the time stipulated; but it does not follow that the forfeiture must be sustained. Appellants stood by and permitted appellee to take possession of the ground and expend a large sum of money in grading and construction. The proof tends to show that the work between Springfield and Lincoln cost approximately \$1,000,000, and that by far the greater portion of this money had been expended, and the work, except overhead construction, substantially completed, prior to September 30, 1906. Under such circumstances it would be a great wrong and injustice to appellee to enforce a forfeiture of the deed. *St. Louis & Belleville Electric Railway Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N. E. 326; *North Jersey Street Railway Co. v. Inhabitants of South Orange*, 43 Atl. 53; 1 Pomeroy's Eq. Jur. 451. It is apparent from the provisions of the deed that the intention of both parties was that the land should be used for the construction and operation of the road between Lincoln and Springfield, and that, to secure its use for that purpose and prevent its being diverted to any other or held without being used, it was provided that the road should be completed and in operation within two years. The failure to have it in operation until a few months later is not shown to have resulted in special hardship to appellants. The decree

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rightly found that the deed should not be forfeited and that the prosecution of the ejectment suit should be enjoined.

[7] Appellants set up in their answer that they were damaged because the fence was not built and the farm crossing constructed in accordance with the deed. Appellee insists that such damages cannot be allowed in this proceeding: First, because the claim should have been presented by a cross-bill and not by answer; and, second, because the forfeiture upon which the action in ejectment was based was declared solely on the ground of a failure to operate the road within two years and not because of failure to build the fence and crossing and provide proper drainage. The chancellor admitted evidence on this question under the pleadings; but the decree found that no damages had been proven by reason of the failure to construct and maintain the fence or crossing or from obstructing the flow of the surface water from the adjacent lands of appellants.

[4] In equity the harsh remedy of forfeiture yields to compensation when fair dealing and good conscience seem to require it. *Harley v. Sanitary District*, 226 Ill. 213, 80 N. E. 771.

[5] When equity is applied to for the rescission, cancellation, and delivery up of deeds or agreements, the court is not bound to pass upon the question as a matter of absolute right, but it is one within the sound discretion of the court, to be exercised in granting or refusing the relief, according to the court's own notion of what is reasonable and proper under the circumstances of the particular case. "In all cases of this sort where the interposition of a court of equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require, and if the plaintiff refuses to comply with such terms his bill will be dismissed. The maxim is here emphatically applied, he who seeks equity must do equity." 2 Story's Eq. Jur. § 639; *O'Connell v. O'Connor*, 191 Ill. 215, 60 N. E. 1063. Where the compensation can be made in money, courts of equity will relieve against forfeitures and compel the party to accept reasonable compensation in money. *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511; 4 Kent's Com. (14th Ed.) *130. The application of this principle in relieving against penalties or forfeitures in chancery must always depend upon the question whether compensation can or cannot be ascertained. Where there can be a clear estimate of damages or just compensation for breaches of conditions or covenants, courts of equity will relieve against forfeitures or penalties and require such compensation to be made. *Harley v. Sanitary District*, supra; 1 Pomeroy's Eq. Jur. (2d Ed.) § 381; *Watson v. White*, 152 Ill. 364, 38 N. E. 902. This is not done in the ordinary sense of granting affirmative relief, in which case a cross-bill would usually be required (*Stone v. Smoot*, 39 Ill. 409; *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234); but on

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the ground that he who seeks in a court of equity to be relieved of a forfeiture or penalty is required by fair dealing and good conscience to make adequate compensation.

[6] Equity having obtained jurisdiction for one purpose will retain it to ascertain and enforce all the rights of the parties involved in the subject-matter in controversy. *People v. City of Chicago*, 53 Ill. 424. The chancellor therefore could rightly admit, under the pleadings in this case, competent evidence to prove that appellants had been damaged by noncompliance with the covenants and conditions in the deed.

[9] The record shows that before the interurban road was constructed there was a farm crossing over the Chicago & Alton Railroad with a somewhat steep approach from appellants' land. In this approach was a bridge or culvert to permit the water to pass north along the Chicago & Alton right of way a short distance and then west under the track. Appellee's road runs east of and parallel with the Chicago & Alton Railroad; but the grade of the interurban road is considerably lower than that of the Alton. In constructing the interurban at the place in question the bridge in the approach was not taken out, but was cut down to correspond with the grade of the interurban road, a new and additional channel being made through this approach to permit the water to flow off the Warrick land, and a temporary bridge was built across this channel while appellee's road was being constructed. After the road was completed the old channel was filled up, and a concrete bridge and culvert were constructed across the new channel. Appellants offered proof to show that the fence was not built in accordance with the deed; that hogs could and did get under it. One of the appellants, however, testified that at the time of the later hearing the fence would have been in good condition if a barbed wire had been placed on the top. There was no evidence that stock of any kind had ever gotten over the fence. It seems to be claimed that the damages caused by an improper bridge being constructed was as to the temporary bridge. The permanent bridge over the channel in question, it was admitted by the same appellant, would be in good condition if it had "hub-rails," and the crossing in good condition if a sunken place (where the former channel was spanned by the old bridge) were properly filled up. How much dirt would be required to fill up this sunken place is not clearly shown. There is no contention that the fence was not put up at the proper date before the commencement of the construction work; but there is a contention as to whether the crossing, including the bridge, was put in at the time specified in the deed. The provision of the deed reads: "Shall furnish and construct a suitable and safe grade crossing over and across said right of way, with proper approaches thereto, and forever maintain the same at a point * * * to

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be designated by the grantors before or during the progress of the construction of the grantee's grade and track over and upon said premises." Manifestly, a proper crossing could not be put in and finished until the right of way was graded and the track completed at that point. We think the weight of the evidence shows that the road over this land was not fully completed, as to ballasting and other necessary work, until a date after the witnesses for appellants had testified upon the question of damages, and, as we have seen, appellants concede that the crossing at the time of the later hearing, was in good condition, except as to hub-rails and filling the sunken place.

Over the objection of counsel for appellee several witnesses testified for appellants that the amount of damages because the fence was not properly constructed was \$10 a year, and by reason of the crossing not being in proper condition \$60 a year, and because of there not being a proper outlet \$30 a year. No attempt was made by any of these witnesses to state the facts upon which their opinions as to damages were based; their conclusions being based upon judgment or opinion.

[8] Opinion evidence is admissible only upon subjects not within the knowledge of men of ordinary experience, on the ground that the facts are of such nature that they cannot be so presented that the average juror can comprehend them sufficiently to form an accurate opinion or draw correct inferences. The opinions of witnesses should not be received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. *Yarber v. Chicago & Alton Railway Co.*, 235 Ill. 589, 85 N. E. 928, *City of Chicago v. McGiven*, 78 Ill. 347. Ordinarily a witness is not allowed to give his evidence as to the damages a party has sustained from a given act or omission, for in so doing he includes the law as well as the fact. It is the duty of the jury or of the court to assess damages on data furnished by witnesses from which the amount of damages may be arrived at. 1 *Sutherland on Damages*, (2d Ed.) § 444; *Dyshane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; 2 *Jones on the Law of Evidence*, § 390; 4 *Ency. of Evidence*, p. 12; *Sedgwick on the Measure of Damages* (6th Ed.) p. 748. The opinions of witnesses should not be asked in such a way as to cover the very question to be found by the court or jury. *Hellver v. People*, 186 Ill. 550, 58 N. E. 245; *Chicago & Alton Railroad Co. v. Springfield & Northwestern Railroad Co.*, 67 Ill. 142. The opinions of witnesses as to the amount of damages caused by trespass in cutting a door in a building are not competent: no facts being asked for and none being given. *Rodgers v. Fletcher*, 13 *Abbott's Prac.* (N. Y.) 299. In a suit to recover damages, by virtue of a contract, from feeding cattle poor hay, it was held that the witnesses must be confined to a statement

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of facts and not to opinions or conclusions as to the damages, formed from facts, whether known to themselves or derived from the testimony of others. *Morehouse v. Matthews*, 2 N. Y. 514. In a suit on a written contract for damages as to digging and walling two cellars, it was held that the witnesses must state the items or particulars upon which they based damages, not making a general estimate of the amount. *Dougherty v. Stewart*, 43 Iowa, 648. See, also, to the same effect, *Central Railroad Co. v. Senn*, 73 Ga. 705; *Harger v. Edmonds*, 4 Barb. (N. Y.) 256; *Thompson v. Dickhart*, 66 Barb. (N. Y.) 604; *Cleveland & Pittsburg Railroad Co. v. Ball*, 5 Ohio St. 568; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 South. 315, 60 Am. Rep. 748. If appellants were damaged by the fence not being built in accordance with the deed, they could have made proof as to the actual amount of damages caused by the hogs getting through, such as the destruction that was committed by the animals, or the time taken in getting them back or fixing the fence to keep them in. No proof of any damage on account of stock getting through the fence was offered except the opinion evidence of these witnesses, testifying as experts, that the damage from the poor fence would amount to \$10 per annum. Neither was there any attempt to prove any items of damage caused by the poor crossing or the flooding of land.

We are disposed to hold that the fair construction of the provision as to farm crossing is that it should be completed within a reasonable time after the road should have been completed. As we have seen, it is conceded that the farm crossing is in good shape, except possibly that it lacks hub-rails on the bridge and the filling in of the sunken place. No proof was offered as to the cost of these conditions. It is true, there is some evidence in the record as to the cost of putting the farm crossing in a safe condition; but this referred to the condition of the crossing at the time of the temporary bridge and not after the permanent bridge was constructed. That evidence, under our construction of the deed as to the time when the crossing should be completed, was not competent. On this record there was no competent evidence as to damages by failure to construct and maintain the fence or crossing or from the obstruction of the flow of the surface water.

The decree of the circuit court must therefore be affirmed.

Decree affirmed.

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(Supreme Court of Alabama, Dec. 1, 1910. Rehearing Denied Feb. 16, 1911.)

[54 So. Rep. 681.]

Death—Action—Limitation.—The general statute of limitation of one year applies to an action by the personal representative of an employee against the employer under the employer's liability act (Code 1907, §§ 3910-3913) to recover for injuries resulting in death.

Death—Action—Limitation.—The burden is upon plaintiff, in an action under the homicide act to recover for death by wrongful act, to affirmatively show that the action was commenced within two years from decedent's death, as required by Code 1907, § 2486; the commencement of the action within that time being of the essence of the right of action, and not merely a limitation upon the remedy.

Master and Servant—Injuries—Action—Actions under Homicide Act—What Law Governs.—The right of the personal representative of an employee to recover for injuries resulting in death in an action against the employer under the homicide act (Code 1907, § 2486) must be determined by the common-law rules, and not by the employer's liability act (Code 1907, §§ 3910-3913).

Master and Servant—Assumption of Risk—Negligence of Fellow Servant.*—At common law an employee assumed the risks of injury from the negligence of a fellow servant.

Master and Servant—Existence of Relation.†—It is not always essential that an employee actually be engaged in performing specific duties, in order to make applicable the rules of law applying to determine his rights and his employer's liabilities where he is injured while actually engaged in the performance of his duties.

Master and Servant—Injuries—Action—Jury Question.—Unless the evidence upon the question of whether or not an employee was engaged in the service when injured, so that the relation of master and servant existed, is conclusive one way or the other, the question is for the jury.

Death—Allegations of Complaint.—The complaint in an action by an administratrix against a railroad company, intestate's employer, alleged that on a certain date, when intestate, a watchman, was on defendant's premises under a license from it, he was pulled or pushed down by an employee of defendant acting within the scope of his authority, and that such employee willfully or wantonly pulled or pushed intestate down and dragged him up certain steps, and that by reason thereof intestate was so injured that he died. Held, that

*See third foot-note of *Massy v. Milwaukee Elect. Ry. & L. Co.* (Wis.), 36 R. R. R. 656, 59 Am. & Eng. R. Cas., N. S., 656; foot-note of *Wickham v. Detroit United Ry.* (Mich.), 35 R. R. R. 321, 58 Am. & Eng. R. Cas., N. S., 321.

†See note at end of case.

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the complaint stated a cause of action for wrongful death under the homicide act (Code 1907, § 2486).

Master and Servant—Negligence of Fellow Servant—Necessity of Pleading.—That an employee was injured by the negligent act or omission of a fellow servant need not be specially pleaded by the employer in order to rely thereon as a defense.

Master and Servant—Fellow Servants—Existence of Relation—Evidence—Jury Question.†—If an employee when injured was upon the employer's premises at an unreasonably early hour for his actual work or for preparation to begin his actual duties, it was for the jury to determine whether the relation of master and servant, and hence that of fellow servant, with a night watchman, did not exist, when he was injured.

Death—Proximate Cause—Concurrent Negligence.—An employer would be liable for the death of an employee whether it was caused solely by the wrongful assault of another employee, or whether such assault concurred with the effect of a surgical operation theretofore performed on decedent.

Master and Servant—Injuries—Action—Sufficiency of Evidence.—In an action by an administratrix for intestate's death, resulting from an assault by defendant's employee, previous acts by such employee in his capacity of night watchman in which he acted when assaulting intestate, which were reasonably related in point of time to the assault in question, were admissible in evidence upon the issue of the scope of his authority.

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Amelia F. Chamblee, administratrix, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The fourth count, as amended, is as follows: "Plaintiff, suing as administratrix of the estate of W. M. Chamblee, deceased, claims of defendant the like sum of \$20,000 as damages, for that on, to wit, the 17th day of October, 1907, the defendant was a corporation owning railroad shops in New Decatur, Alabama, and on said date plaintiff's intestate was on the premises of the defendant in its railroad shops in New Decatur, Alabama, under the license of defendant, and while on said premises he was pulled or pushed down by one H. J. Jones, an employee of defendant, and who was acting within the scope of his authority, and was by the said Jones then dragged up the steps and into the office of the master mechanic of the defendant in its said railroad shops, and that said Jones willfully or wantonly pulled or pushed plaintiff's intestate down and dragged him up said steps as alleged; and plaintiff avers that by reason of said act of

†See note at end of case.

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said Jones her intestate was so hurt and injured that he died on, to wit, October 30, 1907." This count was filed April 7, 1909, and on October 6, 1909, plaintiff amended her complaint so as to strike therefrom counts 1 and 2, which seem to have been filed January 20, 1909.

It was shown that defendant died of strangulation of the bowels, and this is caused by a sudden jar or jerk or outside pressure brought to bear. It seemed from the facts in the case that Chamblee was one of the night watchmen at the railroad shops of the Louisville & Nashville at New Decatur; that the night shift went on about half past 5 o'clock, and that some time just previous to that time Mr. Jones, who was the head watchman, Mr. Chamblee, and another were in consultation at the shop, and that for some reason not stated Mr. Jones and the other grabbed Mr. Chamblee, pulled him in at the door and up the step into the office of the master mechanic, and that he was dragged along the steps upon his stomach; that Jones was chief night watchman, and that he had a right to hire and discharge men, and that all the watchmen were under him. The evidence for defendant tended to rebut this, and also tended to show that there had been a previous operation for appendicitis, or something of that character and that this caused the strangulation.

John C. Eyster, for appellant.

Callahan & Harris, for appellee.

MCCLELLAN, J. Since the ruling in *O'Kief v. M. & C. R. Co.* 99 Ala. 524, 12 South. 454, it has been established that the general statute of limitation of one year applies to bar a recovery for injury resulting in death, where the action is brought by the personal representative of the servant against the master under the employer's liability statute (Code 1907, §§ 3910-3913). The two readoptions of the pertinent statutes, including the general limitation put upon actions for personal injuries, without change important in this regard, remove the possible inquiry first presented in *O'Kief v. M. & C. R. Co.* from further investigation. The question is settled as the statutes stand. Where, however, the cause of action declared on by the personal representative of the employee of the impleaded master is not set forth under the employer's liability statute, but is drawn under the homicide act (Code 1907 § 2486), two years "from and after the death of the testator or intestate," by express provision of the homicide act, is the period within which the action must be commenced. This period of two years is of the essence of the newly by the statute conferred right of action, and the plaintiff has the burden of affirmatively showing that his action was commenced within the period provided. It is not a limitation against the exercise of the remedy only. *Tiffany's Death by Wrongful Act*, § 121; *Rodman v. Mo. Pac. Ry. Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A.

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704, 706, 707; *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; 8 Am. & Eng. Ency. Law, p. 875; 13 Cyc. p. 339. Accordingly the general statute of limitation of one year against actions for personal injuries though resulting fatally is entirely inapt when sought to be pleaded to an action under the homicide act. Where the injury, resulting in death, is to the servant while engaged in the service of the master, his personal representative may rest his action upon the right and remedy provided by the homicide act; but, when he does so, the right to recover must be determined by the common-law rules, without reference to or reliance upon the employer's liability act. *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548, 560, 561, 36 South. 459. In such case the servant's personal representative cannot recover if the injury resulting in a servant's death was proximately caused by the negligent conduct or omission of a properly selected or retained fellow servant; since at common law the injured servant assumes on entering the employment the risk of injury from the negligence of such a fellow servant. *Northern Alabama Railway Company v. Mansell*, *supra*. If the fatally injured employee was not when injured in the service of the defending master, then obviously the coemployee, where negligent conduct or omission caused his death, could not have been the fellow servant of the fatally injured employee, whatever else may have been the relation of such derelict coemployee to the common employer, and however otherwise the wrong or negligence of the derelict coemployee may have been imputable to the employer. When, under all circumstances, an employee is in the service of the employer, is not susceptible, we think, of reduction to general, governing rule. From a full and careful review of many authorities, it can be said, with a satisfactory degree of assurance of soundness, that actual application of the energy or attention of the employee to the specific duties designated for his performance is not invariably essential to subject the employer and employee to the rules of law, and to the consequences wrought out by the rules of law, applicable to the determination of the rights and liabilities, respectively, of the employee and of the employer where the former suffers injury while actually applying his energy or attention to the service stipulated or required by the employer for his performance. This conclusion has been attained in consequence of the very generally accepted view prevailing, and upon sound reason, we think, with a large number of the courts of this country, in cases where the injured employee was going to or from the place of his employment, or where his actual service had been suspended during the work day or work night, and the question was in many of the cases, whether the cause of the injury was the negligent conduct or omission of a properly selected or retained fellow servant, the risk of injury from that negligent conduct or omission

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the injured coemployee having at common law assumed. Among the sources of legal information consulted on this subject were 2 Labatt on Master & Servant, §§ 624, 625, 625a, and copious annotations thereto; 2 Bailey on Master & Servants, § 3208 et seq., and notes thereto. In addition to these, reference may be had to *Pioneer Mining Co. v. Talley*, 152 Ala. 162, 43 South. 800, 12 L. R. A. (N. S.) 861; *Washburn v. N. C. & St. L. Ry.*, 3 Head (Tenn.) 638, 75 Am. Dec. 784; *L. & N. R. R. Co. v. Wade*, 46 Fla. 197, 35 South. 863. It will be seen from the decisions delivered, and to which we refer above, that each case has suggested to the judicial mind dealing with it the solution either by pronouncement upon the undisputed facts as a matter of law or by the affirmation that the issue was or was not as the case was properly submitted to the jury for their determination.

Unless the evidence upon the issue whether the injured employee was in the service at the time of his injury is one way or the other conclusively in point of fact or from necessary inference from facts and circumstances shown, its determination is for the jury. *Packet Co. v. McCue*, 17 Wall. 508, 514, 21 L. Ed. 705; *Walbert v. Trexler*, 156 Pa. 112, 27 Atl. 65. In the former case, McCue, a laborer, was employed to assist in loading a steamer. After fully performing the specific duties for which he was engaged, McCue went, as directed, on the vessel to get his compensation therefor. After being paid, he started over the gangway plank. It was pulled in by men on the vessel, and he was thrown against the dock and injured. It was insisted for the company that McCue's injury was caused by his fellow servants. The Supreme Court, Justice Davis writing, ruled that the inquiry whether McCue's employment had terminated when he was injured as stated was properly submitted to the jury, the concession, in argument, being that, if it had terminated, the company was liable, since the exemption from liability because of common employment did not then prevail; and affirmed the judgment for the plaintiff. The latter decision involved a status of fact and circumstance somewhat similar to that presented by the case at bar. The defendants, the Trexlers, were manufacturers of staves, and Walbert was in their employ; his work being that of a jointer of staves under an open shed. His machine for that service was operated with his foot. He had no connection, in the employment, with the engine or the boiler. An explosion, caused, it was claimed, by a leak in the boiler, resulted in his death. This took place between 6:06 and 6:20 a. m. The hour for deceased to begin work was 6:30 a. m. According to the evidence, deceased was in the boiler room, or on the threshold of its door, when killed, and it was further shown that he had been in the habit of grinding the knife, with which he worked, on a stone in the boiler room. It was insisted for appellants that the employer's liability did not begin until the em-

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ployee's service had actually begun. The court ruled to the contrary, holding that the issue under the evidence was for the jury. While the cases are not identical in point of fact, the following expressions of the learned court, Justice Mitchell writing, seem to be especially applicable to the case at bar: "While the appellants' contention that the employers' liability does not begin until the employee's service has actually begun is in general entirely sound, yet the rule cannot be held absolutely to the stroke of the clock. The deceased lived a mile away from the works. In strict law he was bound to be there when the whistle blew, and he was entitled to a reasonable margin in arriving so as not to be late. * * * The learned judge told the jury that the employer owed no duty to one who came at an unreasonable hour, and, if Walbert came an hour or two before his time and sat around with other people, he was not in the line of his duty, but declined to say as matter of law that such was the case here, and left that fact under all of the evidence to the jury. In this he was right."

Count 4 as last amended stated a cause of action under the homicide act. It was introduced, by amendment, within the two years prescribed by that act. The evidence fixed the date of the death of intestate within that period before count 4 was filed. Under the practice and rule established in *Alabama Con. C. & I. Co. v. Heald*, 154 Ala. 580, 45 South. 686, the amendment, wrought by the introduction of count 4, was properly allowed. A general traverse of amended count 4 was interposed, thereby without special plea putting in issue the inquiry whether intestate's fatal injury was proximately caused by the negligent act or omission of a fellow servant of intestate; and, if so, the plaintiff could not prevail, for risk of injury, with the limitation before stated, from that source intestate at common law assumed. *Northern Ala. Ry. Co. v. Mansell*, 138 Ala. 548, 561, 36 South. 459, treating plea 5 to the complaint in that cause. In accord with *Northern Ala. Ry. Co. v. Mansell*, on this point, viz., that the exemption of the common employer from liability for an injury to an employee caused by the negligent act or omission of a coemployee need not be specially pleaded, are the following authorities: *Wilson v. Charleston & S. Ry. Co.*, 51 S. C. 79, 28 S. E. 91; *Cin., N. O. & T. P. Ry. Co. v. Lewallen* (Ky.) 32 S. W. 958; *Sheehan v. Prosser*, 55 Mo. App. 569, 575; *Kaminski v. Tudor Iron Works*, 167 Mo. 462, 470, 471, 67 S. W. 221; *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201; *Sayward v. Carlson*, 1 Wash. St. 29, 39, 40, 23 Pac. 830. Reference to 26 Cyc. p. 1402, and to 13 Ency. Pl. & Pr. p. 413, will show that a different view has prevailed with other tribunals than those delivering the decisions cited above. One of the cases of the opposing line of decisions is *Duff v. Willamette Steel Works*, 45 Or. 479, 78 Pac. 363, 668, where the question is elaborately

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considered. The ruling in this particular made in Northern Ala. Ry. Co. v. Mansell, *supra*, is rested on sounder reason, and is we think undoubtedly correct. The affirmative charge, requested by defendant, could not, as appears, have been properly given on the theory that the limitation of one year barred the cause of action declared on in count 4 as last amended. Nor could it have been properly given for defendant on the theory that the watchman—a coemployee of intestate—inflicting the alleged fatal injury was then a fellow servant of intestate, the risk of injury from whom intestate assumed under the common-law doctrine.

Omitting reference to other possible considerations affecting the inquiry, whether such was when the alleged injury occurred the relation existing between intestate and the watchman (see Ga. Pac. Ry. Co. v. Davis, 92 Ala. 300, 312, 313, 9 South. 252, 25 Am. St. Rep. 47, defining who are fellow servants), it is apparent from the evidence in this transcript that it could not be declared to the jury as matter of law that when injured or just prior thereto intestate was in the service of the defendant in such sense as invested him and the defendant with the rights, duties, and liabilities usually prevailing as between master and servant. There was evidence tending to show that the injury was inflicted about 4 o'clock—more than an hour before his duties actually began. There was evidence immediately opposed to that just stated. If intestate was upon the premises at an unreasonably early hour for readiness for his actual service, or was there at a time not reasonably referable to preparation to take up his actual duties, and then suffered injury, it was open to the jury to find that he was not in the service of the defendant; and hence was not, in any event, then relationed as a fellow servant to the watchman.

It is insisted for appellant that the affirmative charge was its due on the theory that the evidence showed that the handling of intestate on the occasion by the watchman was not the proximate cause of his death. There was evidence tending to show that this handling of intestate caused the parting of the casing of the bowels at a place or places where previously a surgical operation had been performed. If the violent treatment alleged to have been received, on this occasion, by the intestate, had the effect to cause his death, or accelerate his dissolution as a consequence of the earlier surgical operation, the defendant, if shown otherwise to be liable, could not claim exemption from the result of its employee's (watchman's) acts in the course of his service to it. L. & N. R. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Thompson v. L. & N. R. R. Co., 91 Ala. 496, 8 South. 406, 11 L. R. A. 146.

Southworth v. Shea, 131 Ala. 419, 30 South. 774, cited for appellant, has no application in this instance because of the marked

Note

dissimilarity in the evidence in each. For like reason, those special charges, requested by defendant, wherein it was hypothesized, in substance, that plaintiff could not recover unless the violence charged was the sole cause of intestate's death, or omitting to exclude, in hypothesis, the idea, supported by the tendencies of the evidence, that the violence received by intestate proximately contributed to his death, were properly refused.

The court, at defendant's request, gave many special instructions confining the plaintiff's right to recover within limits of utmost favor to defendant as regarded the question of proximate cause of intestate's death. It was competent as bearing upon the issue of the scope of Jones' authority—a matter resting in parol—to show previous acts by him in that capacity reasonably related in point of time to that involved in this action. *Robinson v. Greene*, 148 Ala. 434, 43 South. 797; *Birmingham Min. R. R. Co. v. T. C. & I. R. R. Co.*, 127 Ala. 137, 28 South. 679. There was no error in the rulings made by the court in reference to such matter on the trial below. A careful review of the charges refused to the defendant in connection with those given at its instance leaves no room for doubt that no error, prejudicial to defendant, resulted from the refusal of such charges. There is no insistence in brief upon error in overruling the motion for a new trial.

No prejudicial error appearing in the transcript, the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

Note.

WHO ARE SERVANTS.

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- P. Substitute Employed by Servant, 334.
- Q. Servant Loaned or Hired to Another for Particular Service, 335.
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- S. Trainmen and Construction Train Placed under Contractor's Control, 343.
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- U. Not Fellow Servants without Common Master, 344.
- V. Contractor's Servants Not Fellow Servants of Those of Sub-contractor, 345.
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- X. Lessee's Servants Not Servants of Lessor, 347.
- Y. Sleeping Car Company's Employees as Servants of Railroad Company, 347.
- Z. Volunteers, 349.
- AA. Voluntarily Assisting Servant of Another, 352.
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Scope of Note.

The main object of this note is not to discuss general and elementary rules and principles, but to give particular illustrations, generally of peculiar interest to railroads, showing when those rules and principles do, and do not apply, special attention being given to decisions upon debatable questions.

Cross References to Preceding Authorities in This Series on Our Main and Its Kindred Subjects.

Authority of Agents or Other Employees to Hire Servants for Employer.—See foot-note of Yazoo, etc., R. Co. v. Stansberry (Miss.), 38 R. R. R. 761, 61 Am. & Eng. R. Cas., N. S., 761; foot-note of St. Louis, etc., R. Co. v. Jones (Ark.), 39 R. R. R. 94, 62 Am. & Eng. R. Cas., N. S., 94.

Conductor's Authority to Employ Physician for Injured Person.—See foot-note of Bonnette v. St. Louis, etc., R. Co. (Ark.), 30 R. R. R. 771, 53 Am. & Eng. R. Cas., N. S., 771.

Whether Servants of Independent Contractor Are Servants of His Employer.—See foot-note of Campbell v. Jones (Wash.), 38 R. R. R. 473, 61 Am. & Eng. R. Cas., N. S., 473.

Who Are Employees.—See last foot-note of Taylor v. Baltimore,

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etc., R. Co. (Va.), 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776, 62 S. E. 798.

Who Are Employees—Learners Not on Pay Roll.—See foot-note of *Smith v. Western*, etc., R. Co. (Ga.), 36 R. R. R. 230, 59 Am. & Eng. R. Cas., N. S., 230.

Who Are Employees—Servants of Other Companies.—See fifth foot-note of *Yeates v. Illinois Cent. R. Co.* (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65, 89 N. E. 338; fourth head-note of *Floody v. Chicago*, etc., R. Co. (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., N. S., 133.

Who Are Employees—Volunteers.—See second foot-note of *Welch v. Boston & M. R. R.* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35.

Who Are Fellow Servants—Employees of Different Companies.—See last paragraph of foot-note of *Schoen v. Chicago*, etc., R. Co. (Minn.), 37 R. R. R. 658, 60 Am. & Eng. R. Cas., N. S., 658; second head-note of *Jackson v. Detroit*, etc., R. Co. (Mich.), 36 R. R. R. 486, 59 Am. & Eng. R. Cas., N. S., 486.

Who Are Fellow Servants—Employees While Not on Duty.—See first foot-note of *Louisville Ry. Co. v. Wade* (Fla.), 12 R. R. R. 22, 35 Am. & Eng. R. Cas., N. S., 22.

Who Are Fellow Servants—Trainmen and Other Employees of the Railroad Being Transported on the Train.—See second paragraph of first foot-note of *Jachetta v. San Pedro*, etc., R. Co. (Utah), 36 R. R. R. 13, 59 Am. & Eng. R. Cas., N. S., 13; second foot-note of *Hogan v. Boston Elev. Ry. Co.* (Mass.), 25 R. R. R. 167, 48 Am. & Eng. R. Cas., N. S., 167.

Who Are Servants—Contractors.—See extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317; *Campbell v. Jones* (Wash.), 38 R. R. R. 473, 61 Am. & Eng. R. Cas., N. S., 473.

A. TRACKS USED IN COMMON BY TWO OR MORE RAILROAD COMPANIES.

As a general rule, where two or more railroad companies use connecting tracks in common, the employees of one company are not the servants of any of the other companies.

United States.—*Bosworth v. Rogers*, 27 C. C. A. 385, 82 Fed. Rep. 975; *Brady v. Chicago*, etc., R. Co. (C. C. A.), 114 Fed. Rep. 100; *Hamble v. Atchison*, etc., R. Co. (C. C. A.), 31 R. R. R. 797, 54 Am. & Eng. R. Cas., N. S., 797.

Connecticut.—*Zeigler v. Danbury*, etc., R. Co., 23 Am. & Eng. R. Cas. 400, 52 Conn. 543.

Georgia.—*Killian v. Augusta*, etc., R. Co., 79 Ga. 234, 4 S. E. 165.

Illinois.—*Tierney v. Chicago Junction R. Co.*, 92 Ill. App. 631.

Indiana.—*Chicago*, etc., R. Co. *v. Vandenberg* (Ind.), 17 R. R. R. 740, 40 Am. & Eng. R. Cas. 740, 164 Ind. 470, 73 N. E. 990.

Louisiana.—*Williams v. Kansas City*, etc., R. Co. (La.), 29 R. R. R. 557, 52 Am. & Eng. R. Cas., N. S., 557, 45 So. 924.

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Maryland.—Philadelphia, etc., R. Co. v. State, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.

New York.—Gross v. Pennsylvania, etc., R. Co., 42 N. Y. Sup. Ct. 808, 62 Hun 619, 16 N. Y. Supp. 616; Nary v. New York, etc., R. Co. (N. Y. Sup. Ct.), 9 N. Y. Supp. 153; Hurl v. New York, etc., R. Co., 68 N. Y. App. Div. 400; Smith v. New York, etc., R. Co., 19 N. Y. 127, affirming 6 Duer 225; Tierney v. Syracuse, etc., R. Co., 85 Hun 146, 32 N. Y. S. 627.

Pennsylvania.—Beckman v. Meadville, etc., R. Co. (Pa.), 28 R. R. R. 224, 51 Am. & Eng. R. Cas., N. S., 224; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Hunt v. Philadelphia, etc., R. Co. (Pa.), 36 R. R. R. 490, 59 Am. & Eng. R. Cas., N. S., 490, 76 Atl. 13; Kelly v. Union Traction Co., 199 Pa. St. 322.

Texas.—Galveston, etc., R. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486.

Vermont.—In re Merrill, 11 Am. & Eng. R. Cas. 680, 54 Vt. 200.

Wisconsin.—Phillips v. Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544.

Railroads of Two Companies Operated by Another—Freight Divided According to Mileage—Employees of Operating Company Not Employees of Other Two.—In Williams v. Kansas City, etc., R. Co. (La.), 29 R. R. R. 557, 52 Am. & Eng. R. Cas., N. S., 557, 45 So. 924, it is held that a contract or traffic arrangement, by which, for the purpose of having a continuous line between two points, one railroad company operates the railroads of two other companies, and the three roads divide the freight according to mileage, does not create a partnership or agency; and, in consequence, the employees of the operating company are not the employees of the other two companies.

Street Railway Tracks Also Used by Traction Company—Former's Cars Repaired by Latter—Escape of Car from Repair Shop—Collision—Street Railway's Passenger Injured.—The tracks of a street railway at the place of the accident in question were the property of a traction company, but in joint use by it and defendant street railway, under a traffic agreement, which provided that the cars of defendant were to be cleaned and repaired by the traction company. Two cars of defendant had been delivered to the traction company which dismantled one of them, attached it by chains to the other, and started toward the car barn for repairs. The coupling chains broke, and the dismantled car ran down a grade until it collided with a car of defendant, in which deceased was a passenger. The workmen who were to repair and clean the cars were employed and controlled by the traction company, and defendant paid on the basis of an account kept of their wages. It was held that such workmen were not employees of defendant street railway company. Beckman v. Meadville, etc., R. Co. (Pa.), 28 R. R. R. 224, 51 Am. & Eng. R. Cas., N. S., 224.

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Person Sent by Initial Railroad to See to Unloading of Train and Return of Cars—Train Run over Lines of Other Companies at Instance of Shipper.—In *Killian v. Augusta, etc.*, R. Co., 79 Ga. 234, 4 S. E. 165, it appeared that a train loaded with wood was transported over one railroad to a city; and, at the instance of the shipper, permission was obtained from the superintendent of the road for the train to proceed over the lines of two other roads to a third, and over it to the point of destination, the train being manned by employees of the first road; and a person, by direction of the superintendent of that road, accompanied the train for the purpose of seeing that it was unloaded promptly and returned to the road to which it belonged. It was held that the person sent with the train to see to the unloading and return of the cars was not an employee of the last road over which the train ran.

Employee of Owner of Railroad Track Not "Quasi Employee" of Company Using It—Statute.—In *Hunt v. Philadelphia, etc.*, R. Co. (Pa.), 36 R. R. R. 490, 59 Am. & Eng. R. Cas., N. S., 490, 76 Atl. 13, it is held that where defendant railroad company was rightfully using the tracks of plaintiff's employer, another railroad company, the plaintiff was not a "quasi employee," of defendant company, within Pa. Act April, 1868, providing that, when any person shall be injured while employed about the premises of a railroad company of which he is not an employee, the right of action shall be such only as would exist if he were an employee.

Joint Use of Tracks by Street Railway Companies—Conductor of One Company and Motorman of Another.—In *Kelly v. Union Traction Co.*, 199 Pa. St. 322, an action by the conductor of a street railway company against another street railway company to recover damages for personal injuries sustained by the negligence of a motorman of the second company, it is held that the Pa. Act of April 4, 1868, P. L. 58, relating to injuries sustained by persons "while lawfully engaged or employed on or about the roads, works, depots, and premises, of a railroad company," does not apply, where it appears that the two companies by an arrangement between them jointly used double tracks in a street; and that the plaintiff while at work at the terminus and in the act of putting up the fender of of his car was struck by the car of defendant, which, owing to the negligence of its motorman, who failed to turn a switch connecting the two tracks, ran onto the south track, where plaintiff was standing, instead of the north track, where it should have gone, and struck him. In such case the road is the road of the company using it, and an employee of that company lawfully engaged in its services cannot be said to be employed about the road of the other company.

Joint Use of Tracks by Lessor and Lessee—Agreement to Discharge Employees upon Demand of Other Company—General Control of Line by Lessee.—In *Bosworth v. Rogers*, 27 C. C. A. 385, 82 Fed. Rep. 975, it appeared that the A railroad was the owner and

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the B railroad the lessee, of the right of way, and they had agreed together for joint use of the tracks; the lessor company to comply with the regulations of the lessee company in reference to the operation of trains, and the latter to have the general control of the line of railroad; and each had agreed to discharge any of its agents or employees for just cause at the demand of the other. It was held that the employees of the A company were not the fellow servants of those of the B railroad.

Fellow Servants—Employees of Two Companies Using Same Road.—In *Chicago, etc., R. Co. v. Vandenberg*, 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740, 164 Ind. 740, 73 N. E. 990, it is held that the servants of a railroad operating its cars on the tracks of another under a contract between the roads are not, in the absence of any contractual provision showing joint operation of the trains, fellow servants of the employees of the road owning the track.

Agreement between Several Railroads for Use of Each Other's Tracks.—An agreement between several companies owning connecting lines of railroad cannot have the effect of making those who were employed and paid wages by either of the contracting parties, the coemployees of the agents and workmen of the other parties, and where an injury to the employee of one of such companies occurs on the road on another of such companies, and is caused by the imperfect condition of such road, the principle that every employee assumes the risk of negligence of his coemployees, is not applicable to him. *Philadelphia, etc., R. Co. v. State*, 10 Am. & Eng. R. Cas. 792, 58 Md. 372.

Employee of One Railroad Subject to Orders of Another Company While Traveling over Lines of Latter.—An employee of one railroad company who in the course of his employment is obliged to travel over the lines of another company and, while so engaged, to subject himself to the orders of the latter company, is not thereby precluded from recovering damages from the latter for injuries sustained by him in consequences of the negligent acts of its employees. *Hurl v. New York, etc., R. Co.*, 68 N. Y. App. Div. 400.

Trainmen of One Railroad Using Yard of Another, and under Latter's Control.—Plaintiff's intestate was employed by the E. railroad to shovel ashes from a pit in the yard of that company at Elmira. The line of the T. railroad, the defendant, terminated at Elmira, and the E. railroad owned and controlled such yard; and when defendant's locomotives were in it the servants employed on them were under the exclusive control of the officers of the E. railroad, who directed how locomotives should be run, at what speed, what precautions should be used, and what signals given. Plaintiff's intestate, while engaged in his work in such yard, was injured through the negligence of defendant's servants in charge of its locomotive. It was held such servants were not the employees

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of the E. railroad, so as to make them and plaintiff's intestate fellow servants. *Sullivan v. Tioga R. Co.*, 44 Hun 304, 7 N. Y. S. 627, affirmed in 112 N. Y. 643, 20 N. E. 569, 21 N. Y. S. 827, 8 Am. St. Rep. 793.

Employee of One Railroad Subject to Orders of Another While Train Is Running over Lines of Latter.—In *Tierney v. Syracuse, etc., R. Co.*, 85 Hun 146, 32 N. Y. S. 627, it is held that the fact that an employee of a railroad, while working on a train running over the lines of another company, is subject to the orders of the latter company, does not make him a fellow servant of the employees of the latter company.

Employee Not Servant of Another Company Using His Employer's Tracks.—Where deceased was in the sole employ of one railroad company and his injury was caused by the cars of another company who had the right to run their trains over the other's road, recovery for his death against the second company is not precluded on the ground that he was in the same general employ with its servants. So held in *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186.

Joint Use of Track—All Employees but Trainmen Employed Jointly—Collision between Trains of Respective Companies.—The G. railroad company and the T. railroad company used jointly a track between certain stations for running their trains. The roads employed jointly all employees who performed services on the track between certain stations, such as trackmen, laborers, firemen, road masters, station employees, telegraph operators, train dispatchers, and superintendents. But the men running the trains of the respective companies were not employed jointly. An engineer of the T. railroad, by orders given him by a superintendent employed by the companies jointly, negligently ran his train on the side track at a station between the two stations previously referred to, and against three cars thereon, and tried to couple them to his engine, but failed, by reason of which the three cars were pushed off the side track and collided with a train of the G. company. It was held that the trainmen of the G. company were not fellow servants of the trainmen of the T. company. *Galveston, etc., R. Co. v. Crockett*, 6 Tex. Civ. App. 160, 25 S. W. 486.

Trains Run over Tracks of Another Company under Rules and Orders Prescribed by Latter.—In *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475, 25 N. W. 544, it appeared that between M. & S. the trains of the W. C. railroad were run over the defendant's track under the rules and running orders prescribed by the defendant; that a W. C. freight train left M. under special orders from defendant's train dispatcher to "run wild to S., keeping clear of regular trains." There was a dense fog, and at a signal station between those points such train ran into a train of defendant which had left M. before it and was then more than an hour behind time, and which was backing when the collision occurred, and a brakeman of the W. C. train was killed. Neither the W. C. company nor the

Flynn v. Chicago City Ry. Co

In *Bush v. Union Pacific Railroad Co.*, 62 Kan. 709, 64 Pac. 624, the plaintiff, a young lady, was invited by one Bowhay to ride with him on the evening of the accident. In attempting to cross the company's railroad tracks at a railroad crossing they were struck by a passenger train and she sued to recover for the injuries received. It will thus appear that she was merely an invited guest and that Bowhay was driving. At the close of the plaintiff's evidence the defendant demurred thereto, and the court sustained the demurrer and rendered judgment against the plaintiff for costs. On appeal this judgment was affirmed, and the plaintiff was held to have been guilty of such contributory negligence as defeated her right to recover. In the course of the opinion it was said: "It is contended by plaintiff in error that, if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains, such negligence is not imputable to the plaintiff in error. The want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose—mutual pleasure. Her opportunity and ability to see and appreciate the danger were equal to his. She was in no way relying upon him. It is true he furnished the vehicle and did the driving, but she seems to have acted independently of him. When they started from the point where they had stopped for the freight train, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was, in fact, the first to see it."

In *Illinois Central Railroad Co. v. McLeod*, 78 Miss. 334, 341, 29 South. 76, 77, 52 L. R. A. 954, 956, 84 Am. St. Rep. 630, McLeod hired an open carriage, two horses, and a driver to drive him to his desired destination and back again. In attempting to cross a railroad crossing he was injured in a collision between a train and the conveyance in which he was being driven. It was an open conveyance, and McLeod had every opportunity the driver had to avoid the accident. He died from his injuries, and suit was brought to recover for his death. A judgment was recovered, which the court reversed, saying, among other things: "Mr. McLeod gave the driver no directions at all and in no way interfered with his management of the team. From the facts so put, it is too plain for controversy that, if the driver had been the party killed, no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. McLeod in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the driver, the vehicle, and the team. But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when

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the train. It was held that the plaintiff was not an employee of the D. company, and that the conductor of the other train was therefore not his fellow servant, but that the D. company would have been liable to the plaintiff as its employee if it had been negligent in the employment of a suitable conductor on the train in question, or in not having a reasonably safe system for directing its trains.

Ashman Injured in Yard of His Company—Negligence of Engineer of Another Company in Using Switch in Such Yard.—And in *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 20 N. E. 569, 21 N. Y. S. 827, 8 Am. St. Rep. 793, affirming 44 Hun 304, 7 N. Y. S. 627, it appeared that deceased was employed by the N. Y., etc., railroad as an ashman in its yard, which contained a switch track running, at one point, over an ash-pit to a turntable. Defendant, another railroad company, had permission from the N. Y., etc., company to use its tracks and turntable for reversing its engines. While deceased was at work in, or just leaving such ash-pit one of defendant's engines, in charge of its engineer and fireman, was run upon such switch for the purpose of reversing it, and it ran upon and broke deceased's leg. While in the yard defendant's engine was subject to the rules of the N. Y., etc., railroad. It was held that the engineer and fireman of defendant's engine were the fellow servants of deceased.

Coke Company's Car Shifter Injured on Its Side Tracks—Switch Left Open by Freight Conductor.—Plaintiff was employed by a coke company to shift cars on the side tracks of the company, which every morning placed empty cars on the track. Plaintiff's duty was to shift the cars on the side tracks in front of the ovens of the coke company. On the morning of the accident the cars were delivered on one of the side tracks, and plaintiff was advised by the freight conductor that no more cars were coming on such track. The switch had been negligently left open on the track on which plaintiff was working, and cars intended for another track ran through the switch and injured plaintiff. It was held that under Pa. Act April 4, 1868, the railroad crew and car shifters were coemployees while working in the yard together, and plaintiff could not recover. *La Porte v. Pittsburg, etc., R. Co. (Pa.)*, 14 R. R. R. 291, 37 Am. & Eng. R. Cas., N. S., 291, 58 Atl. 860.

Railroad's Cars on Siding Constructed by Railroad for Use of Coal Company—Latter's Car Repairer Killed—Trainmen's Negligence.—The cars of a railroad company were operated on a siding, constructed for the sole use of a coal company by the employees of the railroad company, and an employee of the coal company was killed by the negligence of the trainmen while he was repairing a railroad company's car on the siding of the coal company. It was held that he was a fellow servant of the trainmen, within Pa. Act April 4, 1869. *Miller v. Northern Cent. R. Co. (Pa.)*, 24 R. R. R. 481, 47 Am. & Eng. R. Cas., N. S., 481, 64 Atl. 924.

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B. EMPLOYEES OF ONE COMPANY, WHILE SWITCHING, ETC., AT JUNCTION FOR ANOTHER COMPANY.

Under the ordinary circumstances, where the employees of one company does the switching, flagging, etc., for the trains of another company at junctions or where tracks are used in common, such employees, while so working for the other company, are its servants. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323; *Mills v. Orange, etc., R. Co.* (D. C.), 2 MacArth. 314; *Vary v. Burlington, etc. R. Co.*, 42 Iowa 246; *Floody v. Great Northern R. Co.* (Minn.), 27 R. R. 162, 50 Am. & Eng. R. Cas., N. S., 162, 112 N. W. 875; *Stastney v. Second Ave. R. Co.*, 61 N. Y. Supr. Ct. 104, 18 N. Y. S. 800; *Gulf, etc., R. Co. v. Shelton*, 8 R. R. 634, 31 Am. & Eng. R. Cas., N. S., 634, 96 Tex. 301, 72 S. W. 165.

Employee Switching and Coupling for Two Companies—Wages Paid by Both.—Plaintiff was in the general employment of the C. railroad company, his duty being to attend to the switches and couple and uncouple its cars and those of defendant at a station where they used a common track. His wages were paid by both companies, although he received them from the C. company. He was injured while coupling the cars of defendant. It was held that he was at the time defendant's servant. *Vary v. Burlington, etc. R. Co.*, 42 Iowa 246.

Employee of One Railroad Attending to Trains of Another at Junction.—In *Taylor v. Western Pac. R. Co.*, 45 Cal. 323, it is held that if a railroad company, whose road forms a junction with another road, entrusts a person employed and paid by such other road with the business of attending to its trains at such junction, the fact that he was employed by the other company does not release it for damages caused by his negligence in attending to its trains.

Employees of Union Depot Company as Employees of Railroad.—In *Floody v. Great Northern R. Co.* (Minn.), 27 R. R. 162, 50 Am. & Eng. R. Cas., N. S., 162, 112 N. W. 875, it is held that a railroad company is liable to its servants for the negligence of the employees of a union depot company, whose duty it is to operate the switches and direct the movement of the trains out of the depot yards. For such an occasion, the servants of the depot company became servants of the railroad company.

Switching Crew Employed by One Railroad Also Working for Another—Half of Wages Paid by Latter to Employer Company.—In *Gulf, etc., Ry. Co. v. Shelton*, 8 R. R. 634, 31 Am. & Eng. R. Cas., N. S., 634, 96 Tex. 301, 72 S. W. 165, it is held that where a switching crew, employed to do yard work for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if he had employed them.

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Employee of One Railroad Flagging Trains for Another over Road of Former.—Defendant was a railroad chartered by the state of Virginia, and using the track of a Washington railroad company by agreement, and plaintiff, an employee of the latter company, flagged the trains over the road of the Washington company. It was held that he must be regarded as the employee of the Virginia company while so engaged in flagging its trains. *Mills v. Orange, etc., R. Co.* (D. C.), 2 MacArth. 314.

Flagman of One Company "Acting in Behalf" of Another—Construction of Contract.—A contract between plaintiff railroad company and defendant railroad company gave plaintiff the right to use defendant's tracks in a city for a certain compensation, and provided that each party should alone be responsible for all loss or damage caused by the fault of any employees or servants "acting in its behalf." It was further provided that certain employees, including flagmen should be selected, hired, and discharged by defendant, but plaintiff was required to pay a certain portion of their compensation. It was held that the flagmen were acting not only for defendant, but "in behalf of plaintiff," within the meaning of the contract, and hence plaintiff was not entitled to recover from defendant for damages caused by the negligence of a foreman. *Louisville, etc., Ry. Co. v. Illinois Cent. R. Co.* (Ky.), 22 R. R. R. 653, 45 Am. & Eng. R. Cas., N. S., 653, 93 S. W. 4.

Switchman Employed by Board Composed of Representatives of Three Railroads—Car Inspector of One Company.—But in *Kastl v. Wabash R. Co.*, 114 Mich. 53, 72 N. W. 28, it is held that a switchman in the employ of a board composed of representatives of three railroad companies, to whose general control of a union depot tracks and yard the individual companies are subject, is not a fellow servant of a car inspector employed by one of the companies, even when the switchman is engaged in handling the business of that particular road.

C. SAME—CONTRARY VIEW.

But for cases in which it is held that the employees of one railroad company, when engaged in switching, flagging trains, tending crossing gates, etc., for another railroad company, are not the servants, of the latter, see *Pittsburg, etc., R. Co. v. Bovard* (Ill.), 22 R. R. R. 122, 45 Am. & Eng. R. Cas., N. S., 122, 79 N. E. 128; *Yeates v. Illinois Cent. R. Co.* (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65, 89 N. E. 338; *Ederle v. Vickburg, etc., R. Co.* (La.), 11 R. R. R. 547, 34 Am. & Eng. R. Cas., N. S., 547, 36 So. 664; *Boucher v. New York, etc., R. Co.* (Mass.), 27 R. R. R. 1, 50 Am. & Eng. R. Cas., N. S., 1, 82 N. E. 15; *Erickson v. Kansas City, etc., R. Co.* (Mo.), 7 R. R. R. 300, 30 Am. & Eng. R. Cas., N. S., 300, 71 S. W. 1022; *Railroad v. Martin*, 113 Tenn. 266, 87 S. W. 418.

Switch-Tender Not a Servant of Another Company Using His Employer's Track.—In *Smith v. New York, etc., R. Co.*, 19 N. Y.

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127, affirming 6 Duer 225, it is held that a switch-tender, employed by a railroad company on a portion of its track upon which it permits another company to run trains, is not a servant of the latter, and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the switch-tender's employer.

Engineer Running Engine on Track of Another Company Not Fellow Servant of Its Switchman.—In *re Merrill*, 11 Am. & Eng. R. Cas. 680, 54 Vt. 200, it is held that when one railroad company has a right by contract to run its trains over the track of another railroad company, the latter company is liable for injuries caused solely by the negligence of its own switchman in not properly attending to his duty, to an engineer of the former while operating his engine on said track; such switchman and engineer not being fellow servants, because not servants of the same master.

Switching for Both Companies Done by Engine and Crew of One—Foreign Car Placed in Yard of Other Company by Mistake of Switching Crew—Member of Crew Injured While Removing It.—In *Ederle v. Vicksburg, etc., R. Co. (La.)*, 11 R. R. R. 547, 34 Am. & Eng. R. Cas., N. S., 547, 36 So. 664, it appeared that the lines of the V. railroad and the A. railroad cross at right angles at R.; that the business of the two railroads at that point not requiring two switchmen, an arrangement was made by which the switching required for its purpose by the A. railroad was to be done by a switch engine and crew of the other company, the latter receiving pay for the work according to the number of cars switched; that a coal car with which the A. railroad had no connection having been placed in its yards by the mistake of the agents of the V. railroad, a switching engine and crew of the latter company was sent to withdraw it, and, in the act of doing so, one of the switching crew was, while the engine was on the track of the A. railroad, thrown from the car and killed. It was held that there was no privity between the A. railroad and the employees of the V. railroad.

Part of Switch Tender's Wages Paid by Another Company.—In *Yeates v. Illinois Cent. R. Co. (Ill.)*, 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65, 89 N. E. 338, it is held that a switch tender employed and controlled by one railroad, but one third of whose wages was paid by another railroad, was not a servant of the latter.

Fellow Servant—Switchman Killed in His Company's Yard—Negligent Switching by Employees of Another Company.—In *Pittsburg, etc., Ry. Co. v. Bovard (Ill.)*, 22 R. R. R. 122, 45 Am. & Eng. R. Cas., N. S., 122, 79 N. E. 128, it is held that servants in charge of a caboose, the negligent switching of which in the yards of another company killed a switchman employed by such other company, are not rendered fellow servants of the switchman by the mere fact that the yardmaster of the company owning the yard directed on what tracks the cars of outside companies might be operated.

Gate Tender Operating Gates from House between Defendant's Tracks at Crossing Used by Several Railroads.—In *Boucher v. New*

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York, etc., R. Co. (Mass.), 27 R. R. R. 1, 50 Am. & Eng. R. Cas., N. S., 1, 82 N. E. 15, it was held that evidence that at a dangerous grade crossing of a street over railroad tracks, part belonging to defendant and part to two other railroads, there were gates on each side of the tracks, operated by a gate tender from a house midway the crossing, between tracks belonging to defendant, authorizes a finding that the business of operating the gates was defendant's and that the gate tender was its agent and representative, notwithstanding evidence that the gates were being operated under some arrangement between defendant and one of the other railroads, and that such other railroad hired and paid the gate tender.

Crossing Flagman Working for Convenience of All Companies Using His Master's Tracks and Engineer of Another Company.—In *Erickson v. Kansas City, etc., R. Co. (Mo.)*, 7 R. R. R. 300, 30 Am. & Eng. R. Cas., N. S., 300, 71 S. W. 1022, it is held that a flagman employed by a railroad company, whose tracks in a city were used by other companies, to give signals at a crossing for the convenience of the trains of all companies so using the track, is not a fellow servant of an engineer operating a train for one of the various companies using the track of the flagman's employer, since the necessary element of a common master is lacking.

Flagman Working for Two Other Companies—His Ignorance of Agreement.—In *Railroad v. Martin*, 113 Tenn. 266, 87 S. W. 418, it is held that a flagman employed by a railroad company where its road and two other railroads cross the same street, whose duty, under instructions from his employer, was to flag for the other two railroads, in pursuance of an agreement between such employer and the other roads, which agreement was unknown to the flagman, is not a servant of the other two railroads.

D. UNION DEPOT COMPANY'S EMPLOYEES NOT SERVANTS OF RAILROAD COMPANY USING FACILITIES OF FORMER.

See *Brady v. Chicago, etc., R. Co. (C. C. A.)*, 114 Fed. Rep. 100; *Northern Pac. R. Co. v. Craft (C. C. A.)*, 69 Fed. Rep. 124; *Floody v. Great Northern R. Co. (Minn.)*, 27 R. R. R. 162, 50 Am. & Eng. R. Cas., N. S., 162, 112 N. W. 875.

Terminal Association's Yard Used by Several Railroads—Association's Employee Killed by Negligence of Railroad's Engineer.—The case of *Northern Pac. R. Co. v. Craft (C. C. A.)*, 69 Fed. Rep. 124, was a case where several roads used a station and yard belonging to a corporation known as the Northern Pacific Terminal Association. A terminal association employee was killed by the negligence of a Northern Pacific engineer, and it was held that the men were not fellow servants, the court saying: "It is true that Craft's duties were to check up the cars that came into the yard, whether they belonged to the Northern Pacific Railroad Company or to other companies, but, so far as the record indicates, he was in a distinct

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and separate employment from that of Stapleton (such engineer), and they were in no sense under a common master, or subject to the same control."

Operating Train through Yards of Depot Company—Usual Contract—Railroad Employee Killed—Negligence of Switchman of Depot Company.—A railroad company was operating a train through the yards of a depot company, under the usual contract for the use of the yards and depot jointly with other companies having like contracts, when one of its employees was killed by the alleged negligence of the servants of the depot company in failing to properly turn the switches, which were under the control of the latter company. It was held that the switchmen of the depot company were not the servants of the railroad company, within the meaning of the fellow servant statute of Minnesota. *Brady v. Chicago, etc., R. Co.* (C. C. A.), 114 Fed. Rep. 100.

Depot Company Not Servant of Railroad Companies.—In *Brady v. Chicago, etc., R. Co.* (C. C. A.), 114 Fed. Rep. 100, it is held that the usual contracts between a depot corporation and several railroad companies for the use of the depot and transfer yards of the former do not make the depot corporation the servant or agent of the railroad companies so that they become liable for the negligence of its servants under the maxim respondeat superior.

Company Operating Union Depot for Several Railroads.—But in *Floody v. Chicago, etc., R. Co.* (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., N. S., 133, 123 N. W. 815, it is held that a depot company, operating a union depot under the control and for the convenience of several railroad companies, is the servant of the one for which it performs a particular act.

E. EMPLOYEES RIDING TO OR FROM WORK IN EMPLOYER'S VEHICLES.

According to what seems to be the majority doctrine, the employees of a railroad company while riding to or from work on the cars or other vehicles of the company, are its servants, and not passengers.

United States.—*Louisville, etc., R. Co. v. Stuber* (C. C. A.), 108 Fed. Rep. 934; *Martin v. Atchison, etc., R. Co.*, 166 U. S. 399, 41 L. Ed. 1051; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 40 L. Ed. 999.

Georgia.—*Prather v. Richmond, etc., R. Co.*, 80 Ga. 427, 9 S. E. 530.

Illinois.—*Chicago Terminal, etc., Co. v. O'Donnell*, 114 Ill. App. 345; *Wink v. Weiler*, 41 Ill. App. 336.

Indiana.—*Baltimore, etc., R. Co. v. Clapp*, 35 Ind. App. 403, 74 N. E. 267; *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 62 N. E. 94; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 2 N. E. 749; *Indianapolis, etc., Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145.

Kansas.—*Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83.

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Maine.—Seaver *v.* Boston, etc., R. Co., 80 Mass. (14 Gray), 466.

Maryland.—State *v.* Western Maryland R. Co., 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Massachusetts.—Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770; S. C., 166 Mass. 492, 44 N. E. 611; Gilman *v.* Eastern R. Corp., 73 Mass. (10 Allen), 233; Gilshannon *v.* Stony Brook R. Corp., 64 Mass. (10 Cush.), 228.

Minnesota.—Rosenbaum *v.* St. Paul, etc., R. Co., 38 Minn. 173, 36 N. W. 447.

North Carolina.—Wright *v.* Northampton, etc., R. Co. (N. C.), 10 Am. & Eng. R. Cas., N. S., 151.

Ohio.—Kumler *v.* Junction R. Co., 33 O. St. 150; Manville *v.* Cleveland, etc., R. Co., 11 O. St. 417.

Oregon.—Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Ore. 136, 27 Pac. 91.

Pennsylvania.—Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384; Weger *v.* Pennsylvania R. Co., 55 Pa. St. 460.

Rhode Island.—Ionnone *v.* New York, etc., R. Co., 21 R. I. 452, 44 Atl. 592; Shannon *v.* Union R. Co. (R. I.), 22 R. R. 80, 45 Am. & Eng. R. Cas., N. S., 80, 63 Atl. 488.

Texas.—Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47.

West Virginia.—Sanderson *v.* Panther Lumber Co., 50 W. Va. 42, 40 S. E. 368.

Wisconsin.—Kunza *v.* Chicago, etc., R. Co. (Wis.), 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347, 123 N. W. 403.

Riding to Work in Caboose of Freight Train—Custom.—In Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83, it is held that one in the employment of a railroad company, riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and understanding of the parties, from which car and trains all persons except employees of the company are excluded, of which exclusion such person has full knowledge, is not a passenger, but only an employee of the company. See also, McQueen *v.* Central, etc., R. Co., 30 Kan. 689, 1 Pac. 139.

Hand Riding on Gravel Train to Unload It.—In Kumler *v.* Junction R. Co., 33 O. St. 150, it appeared that defendant railroad, when engaged in ballasting its road, employed a hand to assist in loading and unloading a gravel train, and in the execution of this service it was necessary for him to ride on the train to the place of unloading, he having nothing to do with the operation of the train. It was held that he, while so riding on the train, was a mere employee of defendant.

Riding on Passenger Train to Take Charge of Gravel Train.—Plaintiff, an employee of defendant, was employed by the month to render service generally on the road, in the capacity of baggage master, and conductor of passenger trains and gravel trains, at such times and places along the road as directed; and being ordered to go to F. and take charge of a gravel train the next day at

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that place, took passage on the passenger train for F., but passed by F. to T., and on the morning of the next day returned, by the same train toward F., to take charge of the gravel train as directed. It was held that plaintiff, although he had no duties to perform on the passenger train, was to be regarded while thereon as an employee of defendant. *Manville v. Cleveland, etc., R. Co.*, 11 O. St. 417.

Car Repairer Riding to Work Fellow Servant of Switchman.—A railroad is not responsible to a person employed by it to repair its cars, for a personal injury, arising from the negligence of a competent switchman in failing to promptly adjust a switch upon the track over which the car repairer was being carried by the railroad, free of charge, from his work at noon to his home, as such employees were fellow servants. So held in *Gilman v. Eastern R. Corp.*, 72 Mass. (10 Allen), 233.

Riding to Work on Gravel Train.—A common laborer on a railroad, while riding on a gravel train to his place of work, was injured by a collision caused by the negligence of the company's servants in charge of the train. It was held that no action would lie against the railroad, as the laborer and the trainmen were fellow servants. *Gilshannon v. Stony Brook R. Corp.*, 64 Mass. (10 Cush.), 228.

Riding on Employee's Ticket to Clean Switch—Violation of Sunday Law.—In *Shannon v. Union R. Co.* (R. I.), 22 R. R. R. 80, 45 Am. & Eng. R. Cas., N. S., 80, 63 Atl. 488, it is held that where a servant of a railroad, after cleaning a switch, boarded a car to proceed to another switch to perform a similar task and gave the conductor an employee's ticket, furnished him by the company, he was, during his passage on the car, an employee of the railroad, notwithstanding it was Sunday and that the operation of the car was violative of R. I. Gen. Laws 1896, c. 281, § 17, making it an offense to do any labor on Sunday, except works of necessity or charity.

Workman Riding to Work—Defect in Locomotive.—A railroad corporation, exercising reasonable care in providing and using suitable locomotives and tenders on its road, is not liable for an injury occasioned by a defect therein to a workman, employed by them, while he is being carried over their road to his work without paying fare. So held in *Seaver v. Boston, etc., R. Co.*, 80 Mass. (14 Gray), 466.

Conductor Riding on Caboose to Report for Duty Not Fellow Servant of Engineer.—In *Galveston, etc., R. Co. v. Crawford*, 9 Tex. Civ. App. 245, 27 S. W. 822, 29 S. W. 958, it is held that where a conductor was riding on a caboose in obedience to an order from his company to report for duty at a certain place, he and the engineer of the train were not fellow servants.

Railroad's Servant Invited to Ride Home from Work—Fellow Servant of Trainmen.—In *Ionnone v. New York, etc., R. Co.*, 21 R.

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I. 452, 44 Atl. 592, it is held that where a servant of the defendant railroad company, upon the completion of his work, is invited to ride in defendant's car to a point near his home, the carriage being gratuitous, an injury resulting to such servant through the careless management of the train must be regarded as received through the negligence of a fellow servant.

Section Master Riding Home on Engine at End of Day's Work.—Plaintiff, a section master, was injured while riding home on one of his employer's engines after his day's work was over, it being his custom to go to his sleeping place either on a hand car or on one of defendant's trains, no fare being at any time accepted from him for such transportation. It was held that plaintiff was not a passenger when injured, but an employee. *Wright v. Northampton, etc., R. Co. (N. C.)*, 10 Am. & Eng. R. Cas., N. S., 151.

Lumber Company's Employees Riding Home on Hand Car at Night.—In *Arkadelphia Lumber Co. v. Smith (Ark.)*, 24 R. R. R. 514, 47 Am. & Eng. R. Cas., N. S., 514, 95 S. W. 800, it is held that where defendant lumber company furnished its employees with a hand car on which to transport themselves to their homes at the end of each day's labor such employees were still in the lumber company's service while traveling over its road to their homes.

Foreman of Lumber Camp Riding to and from Camp on Logging Train.—In *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, it is held that a foreman of a lumber camp whose duty requires him to ride on a logging train to and from the camp to the mill is a fellow servant with the employees of the same employer operating such train unless there is an express or implied contract requiring him directly or indirectly to pay for his transportation.

Common Laborer Riding to and from Work.—One in the employ of a railway as a common laborer in repairing the tracks is not a passenger while being carried to and from his work in a work-car, but an employee. *Indianapolis, etc., Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145.

Hands Constructing Trolley Line Riding to and from Work in Wagon.—In *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 62 N. E. 94, it is held that where plaintiff and other workmen engaged in constructing a trolley line were transported to and from work in a wagon furnished by the company, they were employees while so riding, and not passengers.

Pumper While Riding between Pumping Stations—Wrongfully Riding in Engine.—In *Kunza v. Chicago, etc., R. Co. (Wis.)*, 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347, 123 N. W. 403, it is held that a pumper whose duties required him to ride between pumping stations on defendant railroad's trains, upon a pass given him for such purpose, was as much in the company's service while necessarily riding between such stations in the proper place on the train as when operating the pumps. But if he was chargeable with notice that he had no right to ride in the engine, and voluntarily

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and without permission rode there for his own purpose, he would not be an employee while so riding.

Station Agent Riding Home at Night by Permission of Conductor.—But where a station agent was riding to his home on a passenger train of his employer, by permission of the conductor, five hours after his labors for the day had ceased, it was held that he was a passenger, and not an employee, and did not take the risks attending the operation of the train with the coach instead of the engine in front. So held in Louisville, etc., *R. Co. v. Scott*, 108 Ky. 392, 56 S. W. 674.

**F. WHERE EMPLOYEE'S RIGHT TO RIDE TO OR FROM
WORK IN HIS MASTER'S VEHICLE IS
SECURED BY CONTRACT OF
EMPLOYMENT.**

And there are authorities holding that a servant riding to or from work in a vehicle of his master continues to be a servant, and is not a passenger, whether his right to transportation is conferred by his contract of employment, custom, or merely as a favor by his master. Louisville, etc., *R. Co. v. Stuber* (C. C. A.), 108 Fed. Rep. 934; *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110; *O'Brien v. Boston*, etc., R. Co., 138 Mass. 387, 52 Am. Rep. 279; *Cicalese v. Lehigh Valley R. Co.* (N. J.), 29 R. R. R. 167, 52 Am. & Eng. R. Cas., N. S., 167, 69 Atl. 166; *Whitney v. New York*, etc., R. Co., 43 C. C. A. 19, 102 Fed. Rep. 850; *Vick v. New York*, etc., R. Co., 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267; *Tunney v. Midland Ry. Co.* (Eng.), L. R. 1 C. P. 291, 12 Jur. N. S. 691.

Riding to and from Work—Part of Contract of Service.—In *Vick v. New York*, etc., R. Co., 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267, it is held that where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employee.

Laundress Riding to Work in Wagon—Negligence of Employer's Coachman.—In *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110, it is held that where a woman, who is employed by a person as a laundress, and who, while being conveyed, either gratuitously or as part of the contract of employment, from her house to that of her employer in his wagon, the horse attached to which is driven by his coachman, is injured by the negligence of the latter, she is to be regarded as in the service of the former at the time of the accident, and a fellow servant of the coachman.

Riding from Home to Work on Monday Morning under Agreement.—After the removal of defendant's shops from R. to B., many of its employees at R. who still continued to reside there remained in its employ under an agreement that they were to be taken to B. every Monday morning, and brought back Saturday evening, free

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of charge, their wages beginning when they reached the shops in B., and ending when they left them. They were carried on a car called a shop car, in which other persons, who paid fare, were permitted to ride. Deceased, who had been in defendant's employ in R., but was not employed at the time of the removal, after such removal was employed in his former position, with the agreement that he should be passed with the other employees in the shop car, and he was paid for his work in accordance with the arrangement stated. All of such employees traveled under a pass given to the master mechanic. It was held that deceased, in traveling under such agreement from R. to his work at B., was an employee, and not a passenger. *Vick v. New York, etc., R. Co.*, 17 Am. & Eng. R. Cas. 609, 95 N. Y. 267.

Laborer Injured While Riding Home—Negligence of Engineer.—A laborer employed by a railroad to work in connection with a train of cars, under an arrangement by which he was to be conveyed to his home every night in such cars free of charge, cannot maintain an action against the company for an injury sustained, while thus riding home, in consequence of the negligence of the engineer, because he was, while so riding, an employee of the company and a fellow servant of the engineer. So held in *Russell v. Hudson River R. Co.*, 17 N. Y. 134, reversing 5 Duer 39.

Riding Home from Work on Hand Car—Negligence of Foreman in Charge of Car.—In *Wilson v. Banner Lumber Co.*, 108 La. 590, 32 So. 460, it is held that where an employer returns his laborers to their homes by means of a hand car a number of miles from work, after working hours, the employer is liable in damages for an accident which happens while they are so returning home, due to the negligence of the foreman in charge of the hand car, even though the accident happens after the day's work had been completed.

Day Laborer Riding Home from Work under Contract.—In *Tunney v. Midland R. Co. (Eng.)*, L. R. 1 C. P. 291, 12 Jur. N. S. 691, it appeared that Tunney was a day laborer who was to be carried, under an express contract, on defendant's daily train from B., where he resided, to the spot where his work was to be done, and carried back when his day's work was over to B. He was injured while returning home on defendant's train. It was held that he was in the defendant's employment when injured.

Riding Home from Work on Hand Cars.—In *Cicalese v. Lehigh Valley R. Co. (N. J.)*, 29 R. R. R. 167, 52 Am. & Eng. R. Cas., N. S., 167, 69 Atl. 166, it is held that where a railroad company provides hand cars for the transportation of its employees from the place where they have been working to a point convenient to their homes, even if the journey is commenced after the usual work of the day has ceased, the relation of master and servant continues until the employee has reached the destination to which he is being carried by, or with the consent of, the railroad company.

Note

Fellow Servants—Collision between Passenger Train and Work Train—Construction Hand Injured While Riding Home.—In *Indianapolis, etc., Co. v. Foreman (Ind.)*, 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214, 69 N. E. 669, it is held that an employee of a railroad who is engaged in constructing the track, who is injured while in a work car of the company for the purpose of being carried to his home from his work, is a fellow servant of employees of the company operating a passenger car which caused the injuries.

Fellow Servants—Conductor Riding Home and Trainmen.—But a freight conductor, not on duty, but riding on one of his employer's trains, on his way to his home, is not a fellow servant with employees who are operating the master's trains. So held in *Illinois Cent. R. Co. v. Leiner (Ill.)*, 8 R. R. R. 740, 31 Am. & Eng. R. Cas., N. S., 740, 67 N. E. 398.

Returning on Train after Rendering, as Ordered, Services Outside Scope of Employment.—An employee of a railroad company, employed by the month to watch its ties along the road, to prevent their destruction, went in obedience to orders from his employer to procure a deed in favor of the company, and voluntarily got on its train, and after performing such duty was voluntarily returning on its train, when the train was derailed and the employee injured. It was held that it was not error to charge, no other facts being shown, that the company was not liable for the injury, as he was an employee of the railroad at the time of the accident, and a fellow servant of those whose negligence was its cause. *Dallas v. G., C. & S. F. R. Co.*, 61 Tex. 196.

Track Repairers Riding to Pay Station—Hand Struck by Hand Car While Trying to Catch Train.—The foreman of a gang of men employed by a railroad in repairing its track ordered them to quit work at fifteen minutes before the usual hour, and take a train, which was to carry them to a certain station, without payment of fare, according to a monthly custom, to receive their wages. One of the men, while running along the track in order to get on the train, was struck by a hand car operated by another gang of men in the employ of the corporation. It was held that he was in the service of the corporation at the time he was injured, and was a fellow servant with those whose act caused the injury. *O'Brien v. Boston, etc., R. Co.*, 138 Mass. 387, 52 Am. Rep. 279.

Foreman of Water-Supply While Riding on Cars between Water Stations.—In *Louisville, etc., R. Co. v. Stuber (C. C. A.)*, 108 Fed. Rep. 934, it appeared that plaintiff was foreman of water-supply on a division of defendant's railroad, his employment being to supervise the tanks and pumping machinery at the water stations; that in the performance of his work he was required to ride over the road from station to station, and was furnished with a pass good on all trains; and that while so riding he was injured in a collision. It was held that he was not a passenger, but an employee at the time of accident.

Note

Riding on Employer's Train for His Own Purposes.—But where plaintiff, in the employment of defendant, changed to a different employment with it, and in connection with the change, stipulated for free transportation to the city where he was to be employed, not in connection with his work, but for his own convenience, it was held that while plaintiff was traveling by virtue of such stipulation, for his own purposes, and while not at work or going to or from his work, he was a passenger, and not an employee. *Whitney v. New York, etc., R. Co.*, 43 C. C. A. 19, 102 Fed. Rep. 850.

G. SAME—CONTRARY VIEW.

But it has been frequently held that where a railroad employee's right to transportation on the cars of the company is directly or indirectly provided for in his contract of employment, as part of the compensation for his services, he is entitled to the rights of a passenger while being so transported, and the company is liable as a carrier of passengers for injuries sustained by him while so traveling.

United States.—*Whitney v. New York, etc., R. Co.*, 43 C. C. A. 19, 102 Fed. Rep. 850.

Georgia.—*Carswell v. Macon, etc., R. Co.*, 118 Ga. 826, 45 S. E. 695.

Massachusetts.—*Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 166 Mass. 492, 44 N. E. 611.

Michigan.—*Noe v. Rapid R. Co.*, 133 Mich. 152, 94 N. W. 743, 8 R. R. R. 654, 31 Am. & Eng. R. Cas., N. S., 654.

Missouri.—*Pembroke v. Hannibal, etc., R. Co.*, 32 Mo. App. 61.

New Jersey.—*New York, etc., R. Co. v. Burns*, 39 Am. & Eng. R. Cas. 423, 51 N. J. L. 340, 17 Atl. 630.

Pennsylvania.—*McNulty v. Pennsylvania R. Co. (Pa.)*, 8 Am. & Eng. R. Cas., N. S., 685; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

Texas.—*Eason v. S. & E. T. R. Co.*, 65 Tex. 577.

Washington.—*Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543.

West Virginia.—*Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368.

In *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556, it is held that an employee of a railroad company riding upon a pass to or from his residence from or to the place of his employment, is entitled to the same care as other passengers.

Passenger—Construction Hand Riding Home from Work.—In *McNulty v. Pennsylvania R. Co. (Pa.)*, 8 Am. & Eng. R. Cas., N. S., 685, it appeared that the contract of employment in question of one employed by defendant railroad to work on a bridge provided that he should have, in addition to his wages, free transportation to and from his work to his home. It was held that while traveling home from his work he was a passenger, not an employee.

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At One Time an Employee and Passenger at Another.—In *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 166 Mass. 492, 44 N. E. 611, it is held that a person may at one time be an employee when passing over a railroad, and at another time in passing over the same road be a passenger, though continuing all the while in a popular sense in the employment of the railroad company.

Furnished Ticket Containing More Rides than Necessary—Riding for Pleasure.—An employee of a railroad company was furnished by it each month with a ticket which contained more rides than were necessary in traveling to and from his work, and on which he was at liberty to ride whether in the service of the company or on his own private interests or pleasure. While traveling on the ticket on his own personal business, when his time was his own, he was killed in a collision. It was held that at the time of the accident he was not in the employment of the railroad company, within Mass. Pub. St. c. 112, § 212, but was a passenger. *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 166 Mass. 492, 44 N. E. 611.

Servant's Work at Terminal Point—Right to Require Him to Vacate Seat in Car.—In *New York, etc., R. Co. v. Burns*, 39 Am. & Eng. R. Cas. 423, 51 N. J. L. 340, 17 Atl. 630, it is held that a common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot lawfully require him to vacate a seat in a car, to which he has been duly assigned.

Day Laborer Riding Home from Work.—In *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, it is held that where one is employed as a day laborer at so much per day and his transportation to and from his place of labor, at the end of his day's work, he is no longer in the employ of his employer, and if he is injured while returning home on the latter's cars at the close of the day's work, by reason of the negligence of any of the company's employees, it is liable therefor, as the fellow servant rule is inapplicable because he was not an employee when injured.

Foreman of Lumber Camp, Riding to and from Camp to Mill on Logging Train, and Trainmen.—In *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, it is held that a foreman of a lumber camp whose duties in the interest of a common employer require him to ride on a logging train to and from the camp to the mill is a fellow servant with the trainmen of such train, and not a passenger, unless there is an express or implied contract requiring him directly or indirectly to pay for his passage.

H. SERVANT TRAVELING IN HIS MASTER'S VEHICLE ON HIS OWN PERSONAL BUSINESS.

It has been held that a servant when out on duty, and traveling in his master's vehicle on his own private and personal business or affairs, is not entitled to the care and protection of a servant.

Note

Russell v. Oregon S. L. R. Co. (C. C. A.), 26 R. R. R. 601, 49 Am. & Eng. R. Cas., N. S., 601, 155 Fed. Rep. 22; *Simons v. Oregon R. Co.*, 41 Ore. 151, 69 Pac. 440.

Bridge Foreman Riding on Hand Car, at Night, on His Own Private Affairs.—Plaintiff's intestate, who was a bridge foreman on defendant's railroad, living at the time in an outfit car on a siding, went with his family on a velocipede car one afternoon to a spur track about 2½ miles distant, near which his father-in-law resided. The car was returned, and in the evening about seven o'clock some of the men by his direction came after him with a hand car. He was then at his father-in-law's house, where he had been visiting since five o'clock, by which time his business at the spur track, if any, had been finished. About 8:30 he started back with the men, having no light on the car, and while on the way was killed in a collision with a special train. It was held that at the time of the accident he was engaged on his own private affairs, and no relation of master and servant between him and defendant existed. *Russell v. Oregon S. L. R. Co.* (C. C. A.), 26 R. R. R. 601, 49 Am. & Eng. R. Cas., N. S., 601, 155 Fed. Rep. 22.

Street Car Conductor Riding, While Off Duty by Reason of Sickness, and Driver.—But where a street car conductor in defendant's employ boarded one of its cars during a temporary suspension of duty by reason of illness, and was directed by the conductor of the car to ride on the front platform, and while so riding without payment of fare, he was thrown from the car and injured by the negligence of the driver in suddenly loosening the brake. It was held that he was a fellow servant of the driver. *McLaughlin v. Interurban St. R. Co.* (N. Y. Sup. Ct.), 91 N. Y. Supp. 883, 885.

I. WHILE NOT ON DUTY.

As a general rule, it may be stated that an employee is not entitled to the care and protection due a servant while he is not on duty.

United States.—*Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. Rep. 119; *Orman v. Salvo* (C. C. A.), 117 Fed. Rep. 233.

Florida.—*Louisville Ry. Co. v. Wade* (Fla.), 12 R. R. R. 22, 35 Am. & Eng. R. Cas., N. S., 22, 35 So. 863.

Iowa.—*Hurst v. Chicago, etc., R. Co.*, 49 Iowa 76.

Kentucky.—*Cincinnati, etc., R. Co. v. Conley*, 14 Ky. L. Rep. 568, 20 S. W. 816; *Ehmett v. Mitchell-Tranter Co.* (Ky.), 80 S. W. 1148; *Louisville, etc., R. Co. v. Pendleton* (Ky.), 28 R. R. R. 213, 51 Am. & Eng. R. Cas., N. S., 213, 104 S. W. 382.

Maryland.—*State v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Michigan.—*Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270; *Broderick v. Detroit, etc., Co.*, 56 Mich. 261, 22 N. W. 802.

Minnesota.—*Olson v. Minneapolis, etc., R. Co.*, 76 Minn. 149, 78 N. W. 975.

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New Jersey.—*Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31, 54 Atl. 251.

New York.—*Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500; *Russell v. Hudson R. Co.* (N. Y. Sup. Ct.), 5 Deur 39; *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381.

Ohio.—*Columbus, etc., R. Co. v. O'Brien*, 4 O. C. C. 515, 2 O. C. D. 681.

South Carolina.—*Davis v. Atlanta, etc., R. Co.* (S. C.), 3 R. R. R. 317, 26 Am. & Eng. R. Cas., N. S., 317.

Texas.—*Texas, etc., R. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Utah.—*Mickelson v. New East Tintic R. Co.* (Utah), 20 Am. & Eng. R. Cas., N. S., 855, 64 Pac. 463.

England.—*Hutchinson v. New York, etc., R. Co.* (Eng.), 6 Railw. Cas. 580, 5 Exch. 343, 19 L. J. Exch. 206.

Respondent Superior—Negligence of Person Merely in General Employment and Pay of Defendant.—Where one person is sought to be charged with the negligence or wrongdoing of another, the doctrine of respondent superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged, at the time of, and in respect to the very transaction out of which the injury arose. The fact that the former was at the time in the general employment and pay of the latter, does not necessarily make the latter chargeable. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381.

Servant Injured While Not Engaged in Master's Service.—The fellow servant rule does not apply, if the injured servant, at the time of the accident, is not engaged in the actual service of his master, or in some way connected with such service. So held in *Columbus, etc., R. Co. v. O'Brien*, 4 O. C. C. 515, 2 O. C. D. 681.

Servant Injured While Not Acting in Service of Master.—In *Hutchinson v. York, etc., Ry. Co.*, 6 Railw. Cas. 580, 5 Exch. 343, 19 L. J. Exch. 206, it is said in the opinion: " * * * we do not think the master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant where the servant injured was not at the time of the injury acting in the service of the master. In such a case the servant is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant."

Miner Going to Different Part of Mine during Noon Hour to Visit.—In *Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. Rep. 119, it is held that a coal miner who, during the noon hour, goes to a different part of the mine, for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon his employer the duty of a master to see that the entry through which he passes from and to the part of the mine where he is employed is kept in a safe condition for his passage.

Employee Sleeping in Tent Near His Excavation Work and Injured by Blast.—In *Orman v. Salvo* (C. C. A.), 117 Fed. Rep. 233, it

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appeared that an employee assisting in the making of an excavation was sleeping in a tent near the work, when a stone thrown by a blast fell through the tent, injuring him; that he was boarded and lodged in the tent by his employer; and that at the time of the accident the "shift" to which he belonged was not at work. It was held that plaintiff was not, at the time of the accident, a fellow servant of any of the other employees of his employer.

Fellow Servants—Engaged in Own Pursuits after Leaving Work Place.—In *Louisville Ry. Co. v. Wade* (Fla.), 12 R. R. R. 22, 35 Am. & Eng. R. Cas., N. S., 22, 35 So. 863, it is held that the rule denying the master's liability for an injury by a fellow servant has no application to one who, when injured, was not engaged in the performance of his duties to the common master, but had left the scene of his labors, and was engaged in his own pursuits.

Section Hand Killed by Train at Night—Failure to Work Preceding Day.—In *Cincinnati, etc., R. Co. v. Conley*, 14 Ky. L. Rep. 568, 20 S. W. 816, it appeared that deceased had been in defendant's employ as a section hand, by the day, but was not at work on the night he was run over and killed, and had not worked the preceding day. It was held that he was not in defendant's employ at the time of the injury.

Brakeman Employed by the Day Riding from His Home to Work by Permission of Conductor.—A. was employed by defendant railroad as brakeman on a train running daily, Sundays excepted, from U. to B. and back. From Saturday evening until Monday morning this train remained at U. A. was employed and paid by the day, but was not paid for Sunday unless required for work on that day. On Saturday evenings, with the permission of the conductor of his train, and after his work for the day was ended, he was in the habit of leaving U. in time to go out with his own train on Monday morning. On such occasions he was permitted to travel free of charge on a pass which the conductor of his train held for himself and crew. On Sunday while thus riding to B. on the conductor's pass on the caboose car of a freight train of the defendant, A. was killed by a collision with another train caused by the negligence of the employees of defendant. It was held that A. at the time of the collision was not acting in the service of the company, but was substantially a stranger and entitled to all the privileges he would have had if he had not been an employee. *State v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503.

Day Laborer and Engineer.—In *Russell v. Hudson River R. Co.* (N. Y. Supr. Ct.), 5 Duer 39, it is held that the rule that a servant cannot sustain an action against his employer for an injury caused by the negligence of another servant or agent in the common employment, does not apply to the case of a day laborer, whose contract is only from day to day, and who, by arrangement of the company, is carried to and from his work. In such case, if an injury occurs from the exclusive fault of an engineer of the train to such

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a laborer on his passage to work the company will be liable, the laborer then not being in the discharge of any service which his contract with the employer impose upon him.

Employee Injured While Leaving Master's Premises on His Private Business.—In *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, it is held that where a servant, whose duty it is during any time when upon his master's premises to perform the duties incident to his employment, starts to leave such premises on his private business, and is injured by the alleged negligence of the master, while upon the premises, and during working hours, is at the time in the employment of the master.

Brakeman Returning to Yard to Search for Clothing Left in Caboose When He Put on Working Suit.—In *Olson v. Minneapolis, etc., R. Co.*, 76 Minn. 149, 78 N. W. 975, it appeared that on arriving at a terminal yard as a brakeman on one of defendant's incoming freight trains, plaintiff, in accordance with a well established custom among brakeman, changed his clothing, leaving his working suit in the caboose or way car, although he knew that it was not at all probable that said caboose would be attached to the outgoing train to which he would be next assigned for duty. It was held that the brakeman, while returning to the yard and to such caboose for the purpose of obtaining his clothes, or in going upon a caboose attached to a moving train in search of his clothes, or in jumping from the platform of such caboose when through with the search, was not in the service of defendant in the line of his employment.

Fireman, Excused from His Duties, Injured at Crossing.—In *Davis v. Atlanta, etc., R. Co. (S. C.)*, 3 R. R. R. 317, 26 Am. & Eng. R. Cas., N. S., 317, 41 S. E. 468, it is held that where a railroad fireman is excused from his duties by his superior officer, and while attempting to cross a track at a public crossing is injured, he occupies the relation of one of the public, and persons in control of the train owe him the same duty as that owing to one of the public.

Car Inspector Assisting Switching Crew.—In *Louisville, etc., R. Co. v. Pendleton (Ky.)*, 28 R. R. R. 213, 51 Am. & Eng. R. Cas., N. S., 213, 104 S. W. 382, it is held that where a person employed by a railroad company as a car inspector voluntarily undertook, without authority, the work of assisting a switching crew, the relation of master and servant was temporarily suspended.

Volunteering to Work on Top of Employer's Mill.—An employee injured while working on top of his employer's mill, without being directed to do so, and such work not being within the scope of his employment, is a mere volunteer, and can not recover. *Ehmett v. Mitchell-Tranter Co. (Ky.)*, 80 S. W. 1148.

Employee Directed by Boss to Perform Service for Latter.—If the employee of a railroad company be taken from his work for the company by his superior, and directed to perform an individual service for the latter, the company is not liable for an injury sustained by him while he is in the performance of such service. So held in *Hurst v. Chicago, etc., R. Co.*, 49 Iowa, 76.

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Servant of Owner of Building Directed by Contractor to Operate Elevator as Movable Platform for Mason.—A contractor for the repair of a building, including the furnishing of elevators, having placed the elevators in position, called upon a general servant of the owner of the building, whose duty it was to operate the elevators for passengers, to operate an elevator so that a mason in the employ of the contractor could use it as a movable platform in plastering the shaft; and such employee operated the elevator for the mason, under the latter's direction, and while so engaged the mason was injured through the negligence of the operator of the elevator. It was held such operator was not at the time of the injury engaged in his general master's work, and the latter was not responsible for such negligence under the doctrine of respondeat superior. *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500.

Brakeman Not on Duty Requested by Engineer of Train to Assist Him for Latter's Convenience.—In *Mickelson v. New East Tintic R. Co.* (Utah), 20 Am. & Eng. R. Cas., N. S., 855, 64 Pac. 463, an action for injuries alleged to have been sustained by plaintiff while in the employ of defendant as a railroad brakeman on one of defendant's trains, it is held that where it appears from the evidence that plaintiff was not an employee at the time of the accident, but a mere volunteer, unless a request of the engineer of the train that plaintiff assist him, so that the engineer could get off early, could be deemed an employment, a request that the court charge the jury that "Jones, the engineer, did not, by virtue of his position as engineer, have any authority to employ the plaintiff as a brakeman for the defendant, and if he engaged the plaintiff to assist in the management of the train for his own convenience, then the plaintiff did not, by reason of such employment, become the servant or employee of the defendant company," was proper, and should have been given; and it is an error to modify a request for such an instruction by adding, "unless you further find from the evidence that the defendant, or its agent, either knew of such employment, and acquiesced therein, or that the defendant, or its agents, on the day of the accident, and prior to such accident, saw plaintiff working on and about such train, assisting said engineer, and made no objection thereto."

Railroad's Messenger Boy Uncoupling Cars at Request of Foreman of Switch Crew.—Appellee's son was a messenger boy in the telegraph office of appellant. Being ordered to go to town for the mail, he got aboard a switch train then about to go down town, and while thereon, at the request of the foreman of the switch crew, uncoupled the cars, that a kick switch might be made, and in taking up slack was thrown from the cars and hurt. It was not shown that the foreman of the switch crew had authority to employ servants. It was held that the son was a volunteer, and by his act in performing service outside of his duties, made himself a fellow servant of the

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engineer and foreman, and there could be no recovery against the railroad. *Texas, etc., Ry. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Fireworks Sold to Committee—Man and Boy Sent by Vendor to Set Them Off—Boy Firing Rockets under Direction of Committee.—Defendants sold fireworks to an organized committee in a city for the purpose of a celebration. They agreed to, and did, send to the committee at its own expense a competent man, who was their general servant, to set off these fireworks under the direction of the committee, and this man brought with him a boy, also in the general service of the defendants, as a helper. In the course of the display the committee virtually separated the boy from the control of the man and set him at firing rockets, a work which he was not competent to do and which neither his general master nor such man intended him to do. One of these rockets was discharged into a crowd through his negligence and a bystander was injured. It was held that such negligence could not be imputed to the boy's general master, as he was not acting at the time as their servant. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381.

Servant Attempting, at Request of Engineer of Elevator Company, to Loosen Elevator.—A servant of W., while in a safe position in doing his master's work, at the request of the engineer of the defendant elevator company, which was engaged in an independent employment, over which W. had no control, attempted to loosen the elevator which had stuck fast, and while so doing was killed. It was held that W. was not liable, as the accident did not happen while decedent was engaged in serving him; and that the elevator company was not liable, because if the engineer had authority to employ deceased, they were fellow servants, and that if he had no such authority the decedent was a mere volunteer. *Longa v. Stanley Hod Elevator Co.*, 69 N. J. L. 31, 54 Atl. 251.

Foreman of Day Crew Killed after His Working Hours While Lighting Lamps at Request of Foreman of Night Crew.—Deceased, who was foreman of a day railroad gravel dump crew, was requested by the foreman of the entire day crew to tell the night dump crew to do some drilling ahead of the steam shovel, and for this purpose deceased returned to the gravel pit after the expiration of his hour of service in company with the foreman of the night crew, and was asked by the latter to light certain lamps on the caboose; after which deceased was killed by the caving of the embankment while between the steam shovel and the wall of the pit. It was held that the message given deceased in reference to the drilling and the night foreman's request that he light the lamps was not evidence that deceased was in defendant's employment at the time he was killed. *Baker v. Lexington, etc., R. Co. (Ky.)*, 20 R. R. R. 223, 43 Am. & Eng. R. Cas., N. S., 223, 89 S. W. 149.

Employee Resting on Car.—But a railroad employee while resting from his labors on the car provided by his employer for that pur-

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pose is still in the service of his company in regard to the application of the fellow servant rule. So held in *St. Louis, etc., R. Co. v. Welch*, 72 Tex. 298, 10 S. W. 529.

Track Repairer Quitting Work to Get Water.—And a servant engaged in repairing a railroad track does not cease to be a servant when, for a few minutes, he quits actual work to obtain a drink of water. *Jarvis v. Hitch* (Ind. App.), 65 N. E. 608.

New Employment with Same Master.—In *May v. Ontario, etc., R. Co.*, 10 Ont. 70, 26 Am. & Eng. R. Cas., N. S., 337, it is held that if an employee accepted a different employment from that originally contemplated he became the employer's workman in the new employment, just as he had been in the former employment.

J. WHILE GOING TO WORK.

It is generally held that an employee, while going to work not in a vehicle of the master, is entitled to the care due a servant. *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432; *Ewald v. Chicago, etc., R. Co.*, 70 Wis. 420, 36 N. W. 12, 591.

Laborer Employed to Gravel Track Struck by Train While Walking to Work.—In *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432, it is held that a laborer employed to gravel a new and unfinished railroad track, upon which no train had run, and who was walking upon it toward the place where he was to commence his day's work, was overtaken and injured by a passenger train using the new track in consequence of a temporary obstruction upon the old track of the same corporation, which was parallel and about six feet distant. It was held that at the time of the accident such laborer was in the employment of the railroad company.

Engine Wiper Killed by Closing of Train While Going to Work on Path in Railroad Yard.—In *Ewald v. Chicago, etc., R. Co.*, 70 Wis. 420, 36 N. W. 12, 591, it appeared that plaintiff, a wiper of engines in defendant's round-house, in going to and from his work, was, with other employees, in the habit of using a beaten pathway across the defendant's yard; that while going to his work along this pathway, and just as he was crossing the track, he was injured by the jamming together of freight cars which had been left apart in order to allow the employees to pass. It was held that plaintiff, at the time of the injury, was in the employ of defendant.

K. GOING TO, OR RETURNING FROM MID-DAY MEAL.

It is generally held, that a servant while going to or returning from, or eating his mid-day meal, is still in the employment of his master, and entitled to his care and protection as a servant. *Clark v. Chicago, etc., R. Co.*, 92 Ill. 43; *Heldmaier v. Cobbs*, 195 Ill. 172, 62 N. E. 853; *Cleveland, etc., R. Co. v. Martin*, 13 Ind. App. 485, 39 N. E. 759; *Mitchell-Tranter Co. v. Ehmett*, 23 Ky. Law Rep. 1788, 65 S. W. 835; *Swice v. Maysville, etc., R. Co.*, 116 Ky. 253, 75 S. W. 278; *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60;

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Thomas v. Wisconsin Cent. R. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609, 122 N. W. 456.

Relation Not Suspended during Noon Hour.—In *Thomas v. Wisconsin Cent. R. Co. (Minn.)*, 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609, 122 N. W. 456, it is held that the relation of master and servant, in so far as involves the obligation of the master to protect his servant while rightfully upon his premises, is not suspended during the noon hour, when the master expects and expressly, or by fair implication, invites the servant to remain upon the premises in the immediate vicinity of the work.

Going from Eighth Floor to Basement to Eat Dinner.—A workman employed by a contractor in the construction of a building is in the contractor's employ while going at the noon hour from the eighth floor to the basement in order to eat his dinner. *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 64 N. E. 726. This case is distinguished from that of *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60.

Section Hand Eating Dinner on Railroad's Premises.—In *Cleveland, etc., R. Co. v. Martin*, 13 Ind. App. 485, 39 N. E. 759, it is held that where so brief an interval is allowed an employee in which to eat his dinner that he cannot leave the premises of his employer for such purpose, his act in eating his dinner on the premises is an incident to the services; and the mere fact that the employee was not at his work as a section hand at the moment he was injured is not conclusive that the relation of master and servant did not then exist.

Motorman Riding to Dinner and Motorman of Car.—But motorman in the employ of a street railway company when going home to dinner after his morning's work, and riding free on the front platform of a car of the company under a rule that permits employees of the company in uniform to do so, is a passenger and not a fellow servant of the motorman operating the car. So held in *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 59 N. E. 60. In this case it is said in the opinion: "At the time of the accident he did not stand in the relation of a servant to the defendant. His time was his own, and he owed defendant no duties until the time arrived for resuming his work. It was not part of his duties to defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to work. This is different in this particular from cases in which the plaintiff was riding in the line of his duty in the course of his employment. *Gilshannon v. Stony Brook R. Corp.*, 64 Mass. (10 Cush.) 228; *O'Brien v. Boston, etc., R. Co.*, 138 Mass. 387, 52 Am. Rep. 279; *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110; *Manville v. Cleveland, etc., R. Co.*, 11 O. St. 417; *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479, 38 Atl. 524. His rights were the same as if, after finishing his day's services, he had taken a car in the evening to visit a friend or to

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do any business of his own. The fact that he had been in defendant's service during the day would not make him a fellow servant of the motorman while riding in the evening under the rule, any more than if he had been a policeman or a newsdealer."

L. WHEN THROUGH WORK FOR THE DAY.

There are decisions to the effect that a servant, as such, is entitled to the care and protection of his master after he has finished his work for the day, until he has had a reasonable time to leave the premises where he has been employed during the day. *Dishon v. Cincinnati, etc., R. Co. (C. C.)*, 126 Fed. Rep. 194; *Ewald v. Chicago, etc., R. Co.*, 70 Wis 420, 36 N. W. 12, 591; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360; *McGregor v. Auld*, 83 Wis. 539, 53 N. W. 845.

Employee Injured While Putting on Coat to Quit Work—Unguarded Gearing.—In *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, it appeared that while a boy, at the close of his day's work in defendant's paper mill, was putting on his coat preparatory to quitting work, in an open space a few feet wide between unguarded gearing on a paper machine and closets in which clothing of employees was kept, he backed up against the gearing and the garment was drawn into it and he was injured. It was held that relation of master and servant continued to exist between plaintiff and defendant at the time of such accident.

M. AFTER SERVANT HAS FINISHED WORK FOR THE DAY AND HAS HAD REASONABLE TIME TO LEAVE MASTER'S PREMISES.

But after a servant is through work for the day, and has left, or has had a reasonable time within which to leave, the premises where he has been working during the day, he is no longer entitled to care and protection as a servant. *Wink v. Weiler*, 41 Ill. App. 336; *Baker v. Chicago, etc., R. Co.*, 95 Iowa 163, 63 N. W. 667; *Baltimore & O. R. Co. v. Trainer*, 33 Md. 542; *Baird v. Pettit*, 70 Pa. St. 477.

Servant Injured after Leaving Shop for the Day.—Where an employee has ceased work for the day and left the shop where he worked, the relation of master and servant between him and his employer has ceased, and his master's liability to him for negligence is the same as if he were any other citizen. So held in *Baird v. Pettit*, 70 Pa. St. 477.

Day Laborer Injured While Going Home from Work.—In *Baltimore & O. R. Co. v. Trainer*, 33 Md. 542, it appeared that Trainer was employed and paid by the day. At six o'clock p. m. his day's work was ended; and a day when he had been at work, but had finished his day and laid aside his tools, and was on his way home, the injury occurred. He had expected to resume his work the next

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The first of these witnesses, Carl, testified that he did not notice whether the train had a headlight on or not. He did not observe any. He simply heard the noise, saw the light, and knew it went by. He heard no whistle or bell. Gilbert testified that the light which attracted his attention looked as though it was from the open fire box; that the train passed within 10 rods of him, and he observed no lights upon the train besides the light from the fire hole; that he had a side view of the train, and observed no light before the train passed. He heard no bell, whistle, or signal given by the engine. The plaintiff's witnesses above mentioned testified that it was a dark night, and a strong wind was blowing from the northwest.

Dr. Traphagan, the physician, who was called about 11 o'clock at night to attend the plaintiff, and who traveled from the village of Armada, some two or three miles distant, testified that it was a dark night. On the other hand, the person in charge of the United States weather bureau at Detroit testified from his records that the moon was three-quarters full, and that it was a clear night in Detroit, and that, under existing conditions, there would be little or no cloudiness in the southeast portion of Michigan; and that it followed from the existing conditions that the night at Armada was clear. This testimony was corroborated by the person in charge of the United States weather bureau office at Grand Rapids. The engineer, fireman, and brakeman in charge of the engine and tender testified that it was a clear, bright night, and yet they did not know that any accident had happened until the next morning; and, although they went to Romeo after the collision and returned an hour later, they neither observed the wreck of the buggy, the plaintiff in his injured condition, nor the dead horse lying nearby.

The engineer, fireman, and brakeman testified that the engine was not running to exceed 17 miles an hour. Two witnesses produced by the plaintiff testified that in their judgment the engine was running 40 to 50 miles an hour.

Upon the subject of signals, the engineer testified that as he started to go back from Armada to Romeo he set the engine bell ringing, that this was an automatic bell, and that the bell continued to ring all the way from Armada back to Romeo, and until they stopped at Romeo. With reference to the whistle the engineer testified: "I blew the whistle after leaving Armada for Romeo at the different crossings. A crossing whistle is two long and two short blasts. They are blown at the whistling posts. I don't know the Hadley crossing by name, but they said the second crossing the other side of Armada. I don't know these crossings by name. The whistling posts tell us where these crossings are, and I blew at or near the whistling post." The fireman testified to the ringing of the bell, that it was started when they left Armada, and it was ringing when

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although he had not been at work on that day. *Johnson v. Southern R. Co.*, 122 N. C. 955, 29 S. E. 784.

O. IMPLIED AUTHORITY OF SERVANTS TO EMPLOY ASSISTANTS.

Servants have no implied authority to employ assistants, except in emergencies.

Alabama.—*McDaniel v. Highland Ave., etc., R. Co.*, 90 Ala. 64, 8 So. 41.

Georgia.—*Smith v. Western, etc., R. Co. (Ga.)*, 36 R. R. R. 230, 59 Am. & Eng. R. Cas., N. S., 230.

Illinois.—*Goff v. Toledo, etc., R. Co.*, 28 Ill. App. 529.

Indiana.—*Stalcup v. Louisville, etc., R. Co.*, 16 Ind. App. 584, 45 N. E. 802.

Kentucky.—*Clarke v. Louisville, etc., R. Co. (Ky.)*, 30 R. R. R. 542, 53 Am. & Eng. R. Cas., N. S., 542; *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119; *Louisville & N. R. Co. v. Vaughn's Transfer Co. (Ky.)*, 34 R. R. R. 81, 57 Am. & Eng. R. Cas., N. S., 81, 123 S. W. 255.

Mississippi.—*Yazoo, etc., R. Co. v. Stansberry (Miss.)*, 38 R. R. R. 761, 61 Am. & Eng. R. Cas., N. S., 761.

North Carolina.—*Adams v. Southern R. Co. (N. C.)*, 16 Am. & Eng. R. Cas., N. S., 369.

South Carolina.—*Jackson v. Southern Ry. (S. C.)*, 21 R. R. R. 552, 44 Am. & Eng. R. Cas., N. S., 552, 54 S. E. 231.

Tennessee.—*Louisville, etc., R. Co. v. Ginley (Tenn.)*, 11 Am. & Eng. R. Cas., N. S., 443.

The master is not liable for injuries to persons assisting his servant in an emergency, unless the servant is authorized to engage the services of such person in emergencies. *W. B. Conkey Co. v. Bucherer*, 84 Ill. 633.

Working on Train without Pay by Permission of Conductor.—In *Stalcup v. Louisville, etc., R. Co.*, 16 Ind. App. 584, 45 N. S. 802, it is held that one performing labor on a train without reward, with the "acquiescence, knowledge, consent, and permission of the conductor and all other persons running and conducting the train" is not a servant to whom the railroad owes any legal duty, unless it is shown that the conductor or others in charge of the train were authorized to employ such person to perform such labor.

Boy Riding by Permission Directed to Work by Brakeman.—In *Sherman v. Hannibal, etc., R. Co.*, 4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423, it appeared that the conductor had exclusive control of a train and of all persons on it, but that a brakeman, without the knowledge of the conductor, assumed to direct a boy riding on the train, without paying fare but by permission of the conductor, to perform a certain service, and in the attempt to comply with the order the boy was injured. It was held that the railroad company was not liable.

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Person Riding Home on Train after Assisting in Making It Up—Assisting in Loading and Unloading at Stops—Directed by Conductor to Uncouple Engine.—In *Clarke v. Louisville, etc., R. Co. (Ky.)*, 30 R. R. R. 542, 53 Am. & Eng. R. Cas., N. S., 542, it appeared that plaintiff assisted the train crew in question in making up a freight train, and got on the train when it left toward his home. At various stops he assisted in loading and unloading freight. At certain stations he was directed by the conductor to uncouple the engine from a freight car so that the engine might go down a switch and get another car. The train had a full crew, and there was no special need of plaintiff's services. It was held that plaintiff was not an employee of the railroad, the conductor having implied authority to employ assistance only in case of emergencies.

Minor Permitted by Conductor to Ride on Train—Assisting in Unloading.—Where a railroad conductor, in the absence of any emergency and without authority, permitted plaintiff's minor son to ride on a freight train, in consideration of his services in assisting the train crew in loading and unloading freight, the railroad company was not liable to plaintiff for injuries sustained by the son, on the ground that the latter was an employee of the railroad. So held in *Yazoo, etc., R. Co. v. Stanberry (Miss.)*, 38 R. R. R. 761, 61 Am. & Eng. R. Cas., N. S., 761.

Conductor's Authority to Employ Physician for Injured Trespasser.—In *Adams v. Southern R. Co. (N. C.)*, 16 Am. & Eng. R. Cas., N. S., 369, it is held that a railroad conductor, without express authority, cannot render the company liable for medical services for persons injured through the derailment of the train while stealing a ride.

One Assisting Station Agent in Carrying Passengers, for Latter's Sole Profit, on Hand Car.—In *Eastern Ky. R. Co. v. Powell (Ky.)*, 33 S. W. 629, it appeared that plaintiff was injured while on a hand car along with and by leave of a station agent who was employed by a railroad whose line formed a junction with defendant road, and who performed certain duties for defendant; but the value of such services to defendant was paid to the other company; and that defendant's officers had forbidden such agent to use a hand car on their tracks, but it was shown that he had frequently used one, with plaintiff as a helper, in carrying passengers, and that the money received from passengers was not paid to defendant. It was held that plaintiff was not an employee of defendant, but merely a trespasser.

Assistant Employed by Engineer—Ratification—Mere Silence.—In *Mickelson v. New East Tintic Ry. Co. (Utah)*, 20 Am. & Eng. R. Cas., N. S., 855, 64 Pac. 463, it is held that the mere seeing, by an officer of a railroad company of a person on or about its train casts no duty upon the company to take affirmative action. Not, under such circumstances, does mere silence amount to a ratification

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of the employment of such person by the engineer to assist in operating the train, or to an estoppel.

Invalid Employment by Conductor—Ratification—Issue of Pass.—In *Vassor v. Atlantic C. L. R. Co. (N. C.)*, 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629, 43 S. E. 849, it is held that where, at the time plaintiff was injured, while riding on a freight train under an invalid employment by the conductor, he was neither an employee nor a passenger, the fact that the carrier, several months after the injury, issued plaintiff a pass to enable him to return to his home, in which he was described as an "injured employee," was inadmissible to show ratification of the conductor's attempted employment.

Implied Authority of Station Agent to Employ Substitute Mail Carrier.—In *Louisville & N. R. Co. v. Vaughn's Transfer Co. (Ky.)*, 34 R. R. R. 81, 57 Am. & Eng. R. Cas., N. S., 81, 123 S. W. 255, it is held that the general powers of a railroad station agent vest him with authority to make emergency contracts for the railroad company, and where one, who had been employed to carry mail from the depot to a depot of another railroad abandoned that contract, the station agent had implied authority to employ another to do the work.

Agent in Charge of Wrecking Crew.—It seems that the agent of a railroad company sent to the scene of an accident in charge of a wrecking crew, has the implied authority to employ additional assistance, if, in his opinion, it is necessary. *Goff v. Toledo, etc., R. Co.*, 28 Ill. App. 529.

Person on Train Directed by Conductor to Turn Switch.—A conductor in charge of a train has implied authority, in case of an emergency, to employ a brakeman or switchman, but a mere direction or order, given to a person on the train, to do a single act, as to turn a switch, no necessity or emergency being shown, does not establish an employment. So held in *McDaniel v. Highland Ave., etc., R. Co.*, 90 Ala. 64, 8 So. 41.

Person Assisting, at Request of Driver, to Back Horse Car.—In *Marks v. Rochester R. Co.*, 77 Hun 77, 28 N. Y. S. 314, it is held that where a horse car cannot be drawn backward with safety to the passengers of property of its owner with only one man to manage both the horses at one end and the brake at the other end of the car, its driver has authority, from the necessity of the case, to procure assistance and, in exercising such authority, stands in the place of the master, who is chargeable with the consequences to others of any abuse of discretion or neglect of duty in its exercise. And the person who assists the driver at his request does not stand in the relation of a volunteer to the driver's employer, but in that of a temporary servant.

Employed by Conductor—Running Cars Violently Together.—In *Louisville, etc., R. Co. v. Ginley (Tenn.)*, 11 Am. & Eng. R. Cas., N. S., 443, it is held that in a clear case of emergency a conductor

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has authority by implication of law to employ a servant for his company, and where a servant so employed is injured, through the negligence of the conductor in permitting cars to run together with unnecessary violence, the company is liable.

Conductor Permitting Minor to Work as Brakeman—Railroad Chargeable with Conductor's Knowledge.—But in *Hendrickson v. Louisville, etc., R. Co. (Ky.)*, 35 R. R. R. 774, 58 Am. & Eng. R. Cas., N. S., 774, 126 S. W. 117, it was held that where the conductor in charge of a train permitted plaintiff's son, with knowledge that he was under age, to work as a brakeman, the conductor's knowledge that the son was rendering such service was the knowledge of the railroad company, so as to render the latter liable to the boy's father for injuries sustained by his son while so employed.

Servant of Oil Company Told by Conductor to Remove Skids from Track.—And in *Welch v. Boston (Mass.)*, 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35, it is held that where a conductor of a train told decedent, a servant of another company, to remove certain skids, if this was recognized and obeyed as a command, there was a temporary change of employers, so as to make decedent a fellow servant of the conductor.

P. SUBSTITUTE EMPLOYED BY SERVANT.

A substitute employee by a servant, with the express or implied consent of his master, is a servant of the latter. *The Coleridge (D. C.)*, 72 Fed. Rep. 676; *Kansas City, etc., R. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659; *Aga v. Harbach*, 127 Iowa 144, 102 N. W. 833; *Yazoo, etc., R. Co. v. Slaughter (Miss.)*, 29 R. R. R. 553, 53 Am. & Eng. R. Cas., N. S., 553, 45 So. 873; *Pugmire v. Oregon Short Line R. Co. (Utah)*, 27 R. R. R. 660, 50 Am. & Eng. R. Cas., N. S., 660, 92 Pac. 762; *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449.

Substitute Furnished by Servant.—Where a servant upon taking a vacation hires and agrees to pay a substitute for performing his duties, such substitute becomes a fellow servant of those who occupy that relation to the servant whose place he is filling. So held in *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449.

Cooking for Outfit as Husband's Substitute.—In *Pugmire v. Oregon Short Line R. Co. (Utah)*, 27 R. R. R. 660, 50 Am. & Eng. R. Cas., N. S., 660, 92 Pac. 762, it is held that where defendant railroad employed plaintiff's husband as manager for its outfit cars, requiring him to cook or else furnish a cook, and permitting plaintiff to accompany him and cook for the outfit employees, the relation of master and servant existed between plaintiff and defendant, though she was not entitled to pay for her services.

Permission to Leave Minor Son in Charge of Railroad Pumping Station.—In *Yazoo, etc., R. Co. v. Slaughter (Miss.)*, 29 R. R. R. 553, 53 Am. & Eng. R. Cas., N. S., 553, 45 So. 873, it appeared that an employee of defendant railroad, having charge of its pumping

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station and water tank, informed the superintendent that he had to leave on business, and would leave his fourteen year old son in charge, and received the superintendent's permission to do so. It was held that the son, while acting under such permission, was an employee of the railroad.

Substitute Furnished by Servant.—In *Aga v. Harbach*, 127 Iowa 144, 102 N. W. 833, it is held that where a servant employs a substitute to temporarily perform his labor, with knowledge or consent either express or implied of the master, such substitute assumes for the time being the relation of a servant, is subject to the same rules, and in case of injury has the same redress as if regularly employed by the master, even though he may not be entitled to recover wages from the master.

Employed to Do Repair Work on Shipboard by the Day—Send Servant as Substitute—Fellow Servant of Ship's Carpenter.—In *The Coleridge* (D. C.), 72 Fed. Rep. 676, it is held that where one employed to do repair work on shipboard by day's labor sends his servant to do the work in his place, such servant is the fellow servant of the ship's carpenter, in respect to an injury to him resulting from the negligence of the carpenter.

Q. SERVANT LOANED OR HIRED TO ANOTHER FOR PARTICULAR SERVICE.

Where a master loans or hires his servant to another, to perform a particular service for the latter, and gives the latter control of the servant, and the servant expressly or impliedly consents to the transfer of his services, the servant, while such arrangement exists, is the servant of the person to whom his services are transferred.

United States.—*The Coleridge* (D. C.), 72 Fed. Rep. 676.

Georgia.—*Brown v. Smith*, 86 Ga. 274, 12 S. E. 411.

Illinois.—*Grace, etc., Co. v. Probst*, 208 Ill. 147, 70 N. E. 12.

Indiana.—*Parkhurst v. Swift*, 131 Ind. App. 521.

Iowa.—*Vary v. Burlington, etc., R. Co.*, 42 Iowa 246.

Massachusetts.—*Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078; *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759; *Kilba v. Faxon*, 125 Mass. 485; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

New Jersey.—*Delaware, etc., R. Co. v. Hardy*, 4 Am. & Eng. R. Cas., N. S., 577, 59 N. J. L. 35, 34 Atl. 986; *Norman v. Middlesex, etc., Tract. Co.*, 68 N. J. L. 728, 54 Atl. 835.

New York.—*Breslin v. Sparks*, 97 N. Y. App. Div. 69, 89 N. Y. S. 627; *Cunningham v. Syracuse Imp. Co.*, 20 N. Y. App. Div. 171, 46 N. Y. S. 954; *Rozelle v. Rose*, 3 N. Y. App. Div. 132, 39 N. Y. S. 363.

Pennsylvania.—*Johnson v. Western, etc., R. Co.*, 200 Pa. St. 314, 49 Atl. 794.

Tennessee.—*Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. 691.

Texas.—*Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 12 S. W. 972.

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Washington.—*Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

England.—*Rouke v. Whiteman Colliery Co.* (Eng.), L. R. 2, C. P. Div. 208.

A person may be the general servant of one, and at same time the special servant of another, in respect to some particular service. *Vary v. Burlington, etc.*, R. Co., 42 Iowa 246.

In *Grace, etc., Co. v. Probst*, 208 Ill. 147, 70 N. E. 12, it is held that a general servant may be loaned by his master to a third party for some special service, and as to that service he will become the servant of such third party if he is subject to the direction and control of the latter.

One temporarily employed, while in the general service of another, must be treated, as to the temporary employment, as the servant of the person so employing him; and he who has the right to direct and control his conduct in that particular business must be regarded as his master. *Breslin v. Sparks*, 97 N. Y. App. 69, 89 N. Y. S. 627.

Transfer of Services for Particular Occasion.—In Delaware, etc., *R. Co. v. Hardy*, 4 Am. & Eng. R. Cas., N. S., 577, 59 N. J. L. 35, 34 Atl. 986, it is held that a general servant of one person may, for a particular work or occasion, become, pro hac vice, the servant of another person, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in a common employment.

Employee Loaned to Third Person.—Where an employer lends his employee to a third person for a particular employment, the employee, for anything done in such particular employment, is the employee of the third person, though he remains the general employee of the employer. So held in *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398.

Servant Hired to Another.—In *Brown v. Smith*, 86 Ga. 274, 12 S. E. 411, it is held that for an injury inflicted by the negligence of the servant of defendants in the performance of work for which he was hired by them to another who had complete control and direction of him for the occasion, the defendants having no such control, though receiving payment for the work performed by him, and the person to whom he is hired having the exclusive right to discharge him and put another in his place or to put him about other work, there is no liability on the defendants, he being for the time, not their servant, but that of the hirer.

Lumber Company's Employee Acting as Brakeman for Railroad Company.—Plaintiff was employed by a lumber company when the company directed and required him to suspend the work he was performing for them, and to perform services as a brakeman upon a logging train of a railroad company. It was held that while so acting as brakeman he was acting as servant for the railroad company as well as for the lumber company. *Barrow v. Lewis Lumber*

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Co. (Idaho), 29 R. R. R. 454, 52 Am. & Eng. R. Cas., N. S., 454, 95 Pac. 682.

Construction of Telegraph Line—Employee of Telegraph Company Placed in Charge of Railroad Employees.—An employee of a telegraph company who is placed in charge of a gang of men employed by a railroad company, and who directs them in the construction of a telegraph line, is a fellow servant of the men so placed under his charge; and the railroad company is not liable for an injury to a workman caused by his negligence. So held in *Johnson v. Western, etc., R. Co.*, 200 Pa. St. 314, 49 Atl. 794.

Contractor for Sinking of Shaft Employing Engine and Engineer of His Employer.—In *Rouke v. Whiteman Colliery Co. (Eng.)*, L. R. 2 C. P. Div. 208, Chief Justice Cockburn said: "When one person lends his servant to another for a particular employment, the servant, for any thing done in that employment, must be dealt with as the servant of the man to whom he was lent, although he remains the general servant of the person who lent him." The case in which this principle was applied was this: The colliery company contracted with W. to sink a shaft and remove the soil. The service of an engine and engineer were necessary to the accomplishment of this work. The colliery company contracted to let W. have its engine and engineer to aid him in doing the work, and to be under his control; and that it should pay W. as much less for his job as he would have had to pay if he had had to find the engine and pay the engineer himself. By the negligence of the engineer, the general servant of the colliery company, the plaintiff, sustained an injury for which he sued the colliery company. It was held that the engineer, being under the control of W., an independent contractor, and being engaged in doing his work, was, while thus engaged, the particular servant of W., and that, though he had been selected and paid by the colliery company, and was its general servant, the latter was not liable for his negligence while thus engaged.

Employees of Corporation Working in Its Room for Firm under Contract.—Defendants constituted a manufacturing firm, and occupied a room in the factory of the Hornell Iron Works, in which there was machinery operated by the employees of such corporation, under a contract by which the defendants agreed to pay to the corporation the wages paid by it to such of its employees as should be engaged on the work of defendants plus fifty per cent., and were also to pay for the materials which the corporation furnished to them. At a time when two persons only worked in the room, a father and son named Dyer, who were employees of the corporation, but were engaged on the defendant's work under such arrangement, the defendants, acting for the firm, employed plaintiff to work for the firm in such room. It was held that the Dyers, while working under such arrangement were employees of defendants, and not

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employees of the corporation. *Rozelle v. Rose*, 3 N. Y. App. Div. 132, 39 N. Y. S. 363.

Man Sent by Coppersmith to Put Up Gutters Injured by Negligence of Carpenter in Superintending Erection of Staging.—In an action for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a coppersmith, putting up gutters on a building, while he was, as alleged in the declaration, in the employ of defendants, the evidence tended to show that the defendants were repairing the building, and employed a skillful carpenter to superintend the whole job; that, when the time came for putting up the gutters, A., one of the defendants, told the carpenter that he wanted a staging put up, and the staging, for the sole purpose of putting on the gutters, was erected under the direction of the carpenter, who used his own brackets to support it; that the brackets were insecurely fastened to the building; that, on the next day, A. ordered the gutters of a coppersmith, and directed him to send a man to put them up; and that the plaintiff was thus sent; and, when he arrived, was directed by A. where to go to work upon the staging, which fell, causing the injuries. It was held that the only negligence was that of the carpenter, a fellow servant, and that the action, therefore, could not be maintained. *Killea v. Faxon*, 125 Mass. 485.

Workman Furnished by Machinery Company to Another—Control of Latter Superintendent.—In *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, it is held that an expert workman in the employ of a machinery company, furnished by that company to the proprietors of a power plant to make repairs on their machinery under the direction and control of their superintendent, is while engaged in such work the servant of such proprietors.

Trainmen of Train Furnished by Railroad to City—Servants of Latter.—In an action against a municipal corporation for injuries sustained by a laborer in its employ through the negligent operation of a train of gravel cars, it appeared that, for the purpose of transporting gravel from one part of its premises to another, defendant had made a contract with a railroad company by which the latter was to furnish a locomotive, cars, conductor, and trainmen to operate the same, to keep the locomotive and cars in repair, furnish fuel, supplies, rails, and ties, lay the track, and remove it when the filling was complete. The defendant agreed to pay a stipulated sum for the use of the track, cars, and trainmen, and to assume all risk of injury to the trainmen. The conductor had entire control of the train and trainmen, but it was his duty to have the train ready for the use of the defendant, from whose foreman he took instructions as to the trips he made. The railroad company gave no directions in regard to the work and exercised no control over the running of the train except so far as the conductor's oversight constituted such control. It was held that the conductor and the

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other trainmen were the servants of the defendant. *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218.

Teamster of A. Directed to Work for B.—A teamster in the general employment of A. was directed by A. to perform such work as might be required of him by B., by whose foreman he was instructed as to the manner in which he was to load stone upon a wagon from a boat. It was held that B. was the master of such teamster while he was so working for him. *Cunningham v. Syracuse Imp. Co.*, 20 N. Y. App. Div. 171, 46 N. Y. S. 954.

Servant Paid by One Railroad Company and Employed in Yard of Another under Agreement.—In *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 12 S. W. 972, it is held that a servant in the pay of one railroad company and employed in the yard and track of another railroad company under some agreement between them, is entitled, as an employee of the latter company, to protection of the law for injuries received from the want of proper care on the part of the railroad company owning the yard and train, in working upon which the injury was caused, although paid by the other company.

Agent of Contractor Sent to Construct Elevator for Paper Company—Hands Furnished by Latter to Assist—Wages Deducted from Contract Price.—Defendants contracted to construct an elevator in the factory of a paper company for a certain sum, and sent their agent to construct the same. The paper company agreed with such agent to furnish three men, including plaintiff, to assist in constructing the work, and to deduct the cost of their labor from the contract price. It was held that plaintiff was a servant of defendants while working under such agreement. *Parkhurst v. Swift*, 131 Ind. App. 521.

Hands Loaned by Contractor to Subcontractor.—Men loaned by a contractor to a subcontractor to move planks, etc., as required by the latter, will not be held to be the contractor's men in such sense as to make the contractor liable for injuries to them sustained while working for the subcontractor. *Diberner v. Rogers*, 66 How. Pr. Rep. 35.

Employing Servant of Another in Dangerous Work—Absence of Wages.—In *Louisville, etc., R. Co. v. Willis*, 83 Ky. 57, it is held that if one engages the servant of another in an obviously dangerous business he renders himself responsible for any injury the servant may sustain while so engaged, and which can be rationally attributed to the understanding; nor is it necessary, to authorize the recovery, that the servant should have been employed by defendant for wages when the injury was received.

Truckman Employed for Certain Sum to Deliver Fish on Friday—Route Selected by Him—Employer's Servant Used as Assistant.—In an action to recover for personal injuries sustained by reason of the negligence of defendants' servants in driving against plaintiff, it appeared that the defendants, who were dealers in fish, employed a truckman, for a certain sum each Friday, to deliver fish to their

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customers; and he in delivering the same selected his own route and consulted his own convenience. The truckman being sick, told his servant to get help if necessary; and he accordingly procured defendant's servant, with their assent, to drive one team and deliver the fish; and he, while doing so, drove against the plaintiff. It was held that on these facts the action could not be maintained, as such driver was not in defendants' employment at the time of the accident. *Wood v. Cobb*, 95 Mass. (13 Allen), 58.

Transfer of Services for Particular Occasion—Consent.—But to establish the relation of master, for a particular occasion, to the servant of another, it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master, and to accept him as his master *pro hac vice*, and has entered upon such service, and submitted himself therein to the direction and control of the new master. *Delaware, etc., R. Co. v. Hardy*, 4 Am. & Eng. R. Cas., N. S., 577, 59 N. J. L. 35, 34 Atl. 986.

No Transfer of Services without Knowledge of Servant.—In *Brennan v. Berlin Iron Bridge Co.*, 74 Conn. 382, 50 Atl. 1030, it is said in the opinion: "In as much as in the case at bar there was no contract relations between the plaintiff and defendant, and the plaintiff did not intentionally enter the defendant's employ, and the proceeding was but a temporary transfer by the Malleable Iron Company of the services of the plaintiff to the defendant, without any knowledge on the plaintiff's part of any change of masters, the plaintiff did not become so far the defendant's servant, as to assume the risk of the negligence of its employees, or as to justly entitle the defendant to immunity from the consequences of the negligence of its own servants. The plaintiff was only in a limited sense, and indirectly, the defendant's servant, from the fact that he was the servant of the Malleable Iron Company with which the defendant had contracted."

Railroad Employee Working for Contractor in Ignorance.—In *Missouri, etc., Ry. Co. v. Ferch*, 18 Tex. Civ. App. 46, 44 S. W. 317, it is held that plaintiff's averment that he was the servant of defendant is broad enough to cover the phase of the case presented by evidence that he was hired by the defendant, and, though working at the time upon a job being done by an independent contractor, did not know, as he was not informed by defendant, that he was working for such contractor; and that it was not necessary to plead an estoppel against the defendant in order to deny that the plaintiff was working for him at the time of the injury.

Contractor's Servant Engaged in Extra Work in Ignorance.—In an action for injuries occasioned to plaintiff while in the employ of A., a carpenter, by the negligence of B., a mason in the employ of defendant, it appeared that the accident happened while the plaintiff and B. were working together in putting in a ventilator on the roof of a building which A. and the defendant were engaged in repairing; the work on the ventilator being extra work not covered

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by the contract for repairing the building. There was evidence that A.'s men did not know whether they were working on extra work or contract work; that they were working interchangeably on the work covered by the contract and the extra work; and there was no evidence that the plaintiff knew that the ventilator was extra work. It was held that the jury would have been warranted in finding that the plaintiff did not cease to be a servant of A., and that he remained under the control of his foreman while engaged in doing the extra work. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

Team and Driver Hired—Negligent Driving.—But a master is responsible for the negligent driving of a servant, even while the latter is acting temporarily for a third person who has hired the team and its driver from such master; and it is immaterial that the person hiring expressly asked for the services of this particular driver. *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887.

Team and Its Driver Hired to City—Control Retained by Master.—A., who was employed by a city as a laborer in digging a trench for a sewer, was injured by the negligence of B., the driver of a team, while backing the team, which was owned by C., who let the team and the driver to the city for a certain sum per day. In an action by A. for his injury against C., it appeared that D. had general supervision of the work of digging the trench, and of the men engaged in it and the right to direct where the teams should back up and the place to which the dirt should be carted. The plaintiff testified that he had seen the defendant there two or three times, and saw him speak to B., and the defendant, when asked, "Did you exercise any control at all after the team left the barn, or at any time while on the sewer?" Answered, "I passed there three or four times." It was held there was evidence which warranted the jury in finding that B. was, at the time of the injury, the defendant's servant. *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58.

R. WHERE EMPLOYER LENDS HIS SERVANT TO INDEPENDENT CONTRACTOR.

Where the employer lends his services to an independent contractor, and places them under the latter's control, they are, while such arrangement exists, the particular servants of the contractor. *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. 691.

Servant Furnished to Aid Independent Contractor.—In *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 13 S. W. 691, it is held that where one employs an independent contractor to perform a certain work, and furnishes his own general servant, being a competent person, to aid the contractor and be under his exclusive control and direction in the performance of that particular work, the contractor, and not the general master, is responsible for the acts and negligence of the servant while thus engaged.

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S. TRAINMEN AND CONSTRUCTION TRAIN PLACED UNDER CONTRACTOR'S CONTROL.

Trainmen of a construction train furnished by a railroad company to, and put under the control of a contractor, are, while they are working under such arrangement, the servants of the contractor. *Scarborough v. Alabama Mid. R. Co.*, 94 Atl. 497, 10 So. 316; *Miller v. Minnesota, etc., R. Co.*, 38 Am. & Eng. R. Cas., N. S., 234, 76 Iowa 655, 39 N. W. 188.

Contractor's Employee Traveling on Unfinished Part of Railroad—Collision—Engineers Subject to Contractor's Orders.—An action does not lie against a railroad company, as an employer, at the suit of a person traveling on a construction train, for damages on account of personal injuries caused by a collision with another train, when it appears that the plaintiff was traveling on a pass furnished by the contractor for the construction of part of the road, for whom he had been working, and that the injuries occurred on a part of the road which had never been completed and accepted, though trains were running on it furnished by the railroad company for use by the construction company and contractors, with engineers subject entirely to their orders. So held in *Scarborough v. Alabama Mid. R. Co.*, 94 Ala. 497, 10 So. 316.

Construction Trains under Control of Contractor—Negligence of Engineer.—In *Miller v. Minnesota, etc., R. Co.*, 38 Am. & Eng. R. Cas. 234, 76 Iowa 655, 39 N. W. 188, it is held that when, by a contract for the construction of its railroad, the railroad company agrees to furnish the motive power and "operate the construction trains," and the contractor agrees to handle all material and build a certain number of miles per month, the construction trains are placed under the control of the contractor, and the company is not liable for the negligence of an engineer in its employ in running a constructive train at a dangerous rate of speed. In this case it is said in the opinion: "Counsel for appellee claim that, under the clause of the contract requiring the defendant to 'operate the construction train,' the control of the train crew as to the rate of speed at which the train should be run, and the care and vigilance to be exercised by the engineer, was not given to the contractors. This we think was giving the word 'operate,' as used in the contract a much more extensive significance than is authorized by the contract. It is not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it. The whole scope of the contract shows that it was used in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors, Harris & Co.; and to limit the control of Harris & Co. so as to allow the trainmen or the defendant to determine how fast or how slow the train must run, finds no warrant in the contract. Suppose the trainmen should have persisted in running the train

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so slow as to seriously impede the progress of the work, or that they should run so fast as to endanger the safe carriage of the materials, there can be no doubt that Harris & Co. had the power to require them to move the train at a proper rate of speed."

Construction Train under Control of Contractor—Trainmen Retained on Railroad's Pay-Roll—Contractor's Servant Killed.—In *Miller v. Minnesota, etc.*, R. Co. 38 Am. & Eng. R. Cas., N. S., 234, 76 Iowa 655, 39 N. W. 188, it appeared that a contractor agreed to lay defendant's track at the rate of a certain number of miles per month, defendant "to furnish all motive power and cars, and operate the construction trains." One of the contractor's employees was killed by the too rapid running of a construction train. It was held that defendant was not liable, because, from the nature and terms of the contract, it did not have control of the construction train, though the trainmen were retained on its pay-roll and received their wages from it.

Contract to Deliver Wood to Railroad Company—Trainmen under Orders of Contractor—Servant Employed by Contractor Fellow Servant of Trainmen.—But in *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, it is held that where one contracts to deliver wood to a railroad company, the company to furnish the equipment to move it, the men on the train to obey the orders of the conductor, and one of the servants employed by him to load wood upon the car was thrown off and killed, the parties were all servants of the railroad company, and no recovery could be had against it for his death.

Construction Train and Engineer Furnished to Contractor—Wages Deducted from Contractor's Pay.—A railroad company employed M., a contractor, to do certain work upon its road, and furnished him a construction train and an engineer to run it. The company prohibited the running of the train at a greater rate of speed than thirteen miles an hour, and required that it should be on a side-track fifteen minutes before the schedule time for each of the company's trains. Subject to these regulations, the control, management, and direction of the construction train were given wholly to M. The engineer was selected by the railroad, and it alone had the right to discharge him, though bound to do so upon the complaint of M., and to supply his place. The company paid the engineer's wages, but charged the same to M., and deducted the amount thereof from the sum due for his work. A mule having been killed by the negligent running of the construction train, the owner sued the railroad company for its value, and defendant claimed that the train was not run by its servant, but by M.'s. It was held that such engineer was the servant of the railroad company, and not of M. *New Orleans, etc.*, R. Co. *v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191.

T. CONTRACTOR'S SERVANTS NOT SERVANTS OF HIS EMPLOYER.

In the absence of peculiar conditions, the servants of a contractor

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are not the servants of the latter's employer. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Busby v. Anderson, etc., Co.* (C. C. A.), 136 Fed. Rep. 156, 159; *Central R. & B. Co. v. Grant*, 46 Ga. 417, 11 Am. Ry. Rep. 427; *Hitte v. Republican Valley R. Co.*, 19 Neb. 620, 28 N. W. 284; *Mills v. Thomas Elev. Co.*, 54 N. Y. App. Div. 124, 66 N. Y. S. 398; *Coates v. Chapman*, 195 Pa. St. 109, 45 Atl. 676; *Connelly v. Faith*, 190 Pa. St. 553, 42 Atl. 1024; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169.

Man Furnished to Install and Operate Hod Elevator for Contractor.—An elevator company entered into a contract with a corporation engaged in laying concrete in a building, to install a hod elevator and furnish a man to operate it. It was held that the man so furnished was not a servant of the corporation. *Mills v. Thomas Elevator Co.*, 54 N. Y. App. Div. 124, 66 N. Y. S. 398.

Contractor's Foreman Instructed to Obey Superintendent of Building Operation.—In *Coates v. Chapman*, 195 Pa. St. 109, 45 Atl. 676, it is held that where the general superintendent of a building operation exercises no control over the independent contractors, except by calling their attention to the requirements of the contract, the fact that an independent contractor instructs his foreman to obey the orders of the superintendent, does not make his employees and those of the owner of the building fellow servants within the rule exempting the common master from liability for the negligence of a fellow servant.

Contractor's Employee and Employee of Owner of Building.—In *Connelly v. Faith*, 190 Pa. St. 553, 42 Atl. 1024, it is held that where one employed by an independent contractor is working upon a building and is injured by the negligence of an employee of the owner of the building, and it does not appear that the work was not in the line of his duty to his own employer, or that it was not done in aid of and for the convenience of his own employer's business, he cannot be considered a fellow servant of the person whose negligence caused his injury.

Servants of Master Mechanic Not Servants of Latter's Employer.—In *Harkins v. Standard Sugar Refinery*, 122 Mass. 400, it is held that one who employs master mechanics to do certain work under his agent's general direction, each to furnish the men, tools, and tackle necessary for his work, is not, in absence of negligence in their selection liable for an injury resulting to a servant employed by one master mechanic through the negligence of another master mechanic in furnishing imperfect tackle, or in the manner of using it, as such negligence was that of one who was either an independent contractor or a fellow servant of the injured employee.

U. NOT FELLOW SERVANTS WITHOUT COMMON MASTER.

In order to constitute employees fellow servants they must be the servants of a common master.

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United States.—*Hamble v. Atchison, etc.*, R. Co. (C. C. A.), 31 R. R. R. 797, 54 Am. & Eng. R. Cas., N. S., 797; *Northern Pac. R. Co. v. Craft* (C. C. A.), 69 Fed. 124.

Alabama.—*Holmes v. Birmingham So. R. Co.* (Ala.), 14 R. R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815, 37 So. 338.

Colorado.—*Union Pac. Ry. Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923.

Massachusetts.—*Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

Michigan.—*Kastl v. Wabash R. Co.*, 114 Mich. 53, 72 N. W. 29.

Minnesota.—*Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30.

Missouri.—*Erickson v. Kansas City, etc., Ry. Co.*, 17 Mo. 647.

New York.—*Sullivan v. Tioga R. Co.*, 44 Hun 304, 7 N. Y. S. 627, affirmed in 112 N. Y. 643, 20 N. E. 569, 21 N. Y. S. 827, 8 Am. St. Rep. 793.

Although the servants of different contractors, while engaged in working together on a building, are in a common employment they are not fellow servants unless they have a common master. *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101.

Employees of Connecting Railroad and Steamboat Companies—Operating Arrangement.—Defendant and a steamboat company were operating under an arrangement by which defendant was to carry passengers and freight between S. and B., and the steamboat company was to carry them between B. and M., the two connecting at B. as to the time of arrival and departure at that point of trains and boats. Each sold tickets over the route of the other. The prices for such routes were distinct, each receiving a certain portion of the moneys received for fares and charges upon through passengers and freight. It was held that the servants of one of such companies were not fellow servants with those of the other company. *Carroll v. Minnesota Valley R. Co.*, 13 Minn. 30.

Day Laborer Procured by Stevedore and Paid through Latter and Winchman Paid Directly by Ship.—The libellant was one of several men procured by a stevedore to shift coal in a vessel, all of whom were paid for by the ship, by the day, and he was injured by a board which fell through the hatch in consequences of the winchman's starting up the steam-winch without notice to his fellow workman. This winchman was furnished by the ship and not by the stevedore, and was a competent person. It was held that all of such hands were in the common service of the ship; and that it was immaterial that the winchman was paid by the month directly by the ship, and the other men by the day, through the stevedore. *The Harold* (D. C.), 21 Fed. Rep. 428, 431.

V. CONTRACTOR'S SERVANTS NOT FELLOW SERVANTS OF THOSE OF SUBCONTRACTOR.

In the absence of exceptionable circumstances, the servants of a contractor and those of his subcontractor are not fellow servants, they not having a common master. *Pioneer Fireproof Constr. Co.*

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v. Hansen, 176 Ill. 100, 52 N. E. 17; *Dale v. O'Meara Constr. Co.*, 108 Mo. App. 90.

Effect of Contractor's Retaining Power to Inspect Work.—A building contractor who lets a portion of the work to a subcontractor does not, by retaining the power to inspect the work to see that it is honestly performed, become the master of the sub-contractor's employees, so as to be liable for their negligent acts. So held in *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17.

Employee of Subcontractor and Employee of Contractor.—The employee of a subcontractor and an employee of the original contractor are not fellow servants. *Dale v. O'Meara Constr. Co.*, 108 Mo. App. 90.

W. ONE IN QUASI PUBLIC EMPLOYMENT.

One in a quasi public employment, such as a truckman, is not a servant of the person hiring him to do certain work in his line. *Ray v. Jones, etc., Co.*, 92 Minn. 101, 99 N. W. 782; *Jackson, etc., Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665; *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901; *Quinn v. Kansas, etc., R. Co.*, 94 Tenn. 713, 30 S. W. 1036.

Employee Engaged in Independent Calling.—A servant is one who is employed to render personal services to his employer, otherwise than in the pursuit of an independent calling. *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901.

Truckman Not Servant of Employer.—Where special services are rendered to another by one exercising an independent and quasi public employment in the nature of a common carrier, such as a truckman engaged in hoisting goods from the lower to the upper floor of a building, the truckman is not the servant of the person who employs him. So held in *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901.

Physician Employed by Railroad to Attend upon Employees.—In *Quinn v. Kansas, etc., R. Co.*, 94 Tenn. 713, 30 S. W. 1036, it is held that a physician or surgeon employed by a railroad company to attend upon its employees injured in its service does not bear the relation of servant to the company.

Employee Delivering Coal into Coal Hole Not Employee of Abutting Owner.—The employee of a company delivering coal into a coal hole of a sidewalk is not the servant of the abutting owner to whom the coal is delivered. *Ray v. Jones, etc., Co.*, 92 Minn. 101, 99 N. W. 782.

Employee of Firm Engaged in Putting Machine in Defendant's Mill.—There was evidence that plaintiff was working by the month for a firm engaged in putting in a machine into defendant's mill, that the defendant's agent had prepared the specifications for the machine and "sent the order" to the firm "to do the job," but gave no further directions to the firm in regard to the work; and that, when nearly completed in the firm's shop, the machine was

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carried to the mill to be set up, the supporting wood work being prepared by the defendant's employees on the same day. A member of the firm testified, "there was no contract as to making" the machine, "we were to charge them for the stock and time." It was held there was evidence upon which the jury might properly find that plaintiff was not a servant of the defendant. *Ward v. New England Fibre Co.*, 154 Mass. 419, 28 N. E. 299.

Workman Sent by Firm of Machinists and Defendant's Engineer.—But in *Ewan v. Lippincott*, 47 N. J. L. 192, where it appeared that defendant owned a saw-mill, and gave an order to a firm of machinists to make some alterations in the gearing of the water wheel of his mill; that the firm sent the plaintiff and another workman to do the work; that it was understood between these workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel; and that while they were at work upon the wheel the engineer of defendant negligently started the wheel, injuring the plaintiff, it was held that plaintiff was a servant of defendant, engaged in a common employment with the engineer.

X. LESSEE'S SERVANTS NOT SERVANTS OF LESSOR.

The servants of a lessee are not, merely because of the relation between the principals, the servants of the lessor. *Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. Rep. 119; *Ault Woodenware Company v. Baker*, 26 Ind. App. 374, 58 N. E. 265.

Y. SLEEPING CAR COMPANY'S EMPLOYEES AS SERVANTS OF RAILROAD COMPANY.

It is generally held that the employees of a sleeping car company are, practically, the servants of the railroad company hauling the sleeping cars upon which they are employed. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Denver & R. G. R. Co. v. Derry* (Colo.), 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 108 Pac. 172; *St. Louis, etc., Ry. Co. v. Waggoner*, 90 Ill. App. 556; *Gannon v. Chicago, etc., R. Co. (Iowa)*, 31 R. R. R. 27, 54 Am. & Eng. R. Cas., N. S., 27, 117 N. W. 966; *Newcomb v. New York, etc., R. Co. (Mo.)*, 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 24 N. E. 319; *Lewis v. Pennsylvania R. Co. (Pa.)*, 30 R. R. R. 59, 53 Am. & Eng. R. Cas., N. S., 59, 69 Atl. 821.

Pullman Car Porter Employee of Railroad.—The porter of a Pullman car is an employee of the railroad company engaged in the transportation of passengers riding in such car, in the same sense that a brakeman of the train is such an employee. So held in *Gannon v. Chicago, etc., R. Co. (Iowa)*, 31 R. R. R. 27, 54 Am. & Eng. R. Cas., N. S., 27, 117 N. W. 966.

Sleeping Car Porter—Railroad's Passengers Directed to Jump from Moving Train.—A sleeping car porter was an employee of the

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railroad to whose train the sleeping car was attached, so as to charge such company with his negligence in directing passengers to jump from wrong train while it was in motion. *Newcomb v. New York, etc., R. Co. (Mo.)*, 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069.

Sleeping Car Porter Employed Subject to Railroad's Approval.—

Where a passenger purchased a ticket for a passage on an ordinary passenger car and a ticket for a berth in a sleeping car on the same train, the porter of the sleeping car is, in the performance of the duties and obligations of the railroad company under its contract, the servant of such company, although it does not own the sleeping car or hire or pay the porter, though the contract between the sleeping car company and the railroad required that the servants employed by the former should be acceptable to the railroad company. So held in *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 24 N. E. 319.

Pullman Car Employee Fellow Servant of Trainmen—Statute.—In *Lewis v. Pennsylvania R. Co. (Pa.)*, 30 R. R. R. 59, 53 Am. & Eng. R. Cas., N. S., 59, 69 Atl. 821, it is held that one not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, the Pullman Car Company, which simply permits his carriage for and in connection with business of his employer conducted on the railroad, is not a "passenger," but a fellow servant, under Pa. Act April 4, 1868, of the trainmen.

Porter of Sleeping Car Not Attached to Train.—In *Denver & R. G. R. Co. v. Derry (Colo.)*, 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141, 108 Pac. 172, it appeared that, with the knowledge of the railroad company, it was customary for a sleeping car company to have its sleeper ready for passengers of the railroad company before the train to which it was to be attached arrived; that a blind passenger, having a through ticket, changed cars at a station where a sleeping car was ready; and the porter of the train on which he had arrived took him over to the porter of the sleeping car who was informed of his blindness, and through his negligence the passenger was injured while attempting to go to his berth. It was held that the porter of the sleeping car was an employee of the railroad company, as to such passenger, though the sleeping car was not attached to any train.

Porter of Sleeping Car Not Owned by Railroad—Question for Jury.—Plaintiff purchased tickets for himself and wife for a continuous passage from G. to N. Y. in one of defendant's ordinary passenger cars and purchased from the porter of a sleeping car, there being no other person acting as conductor, tickets for a section in a sleeping car in the same train, which, at the proper time, were taken up by said porter. The train was detained by a washout, and after waiting until nearly noon the next day, such porter informed plaintiff he must take another train. The porter

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conducted plaintiff and his wife to a sleeping car in the other train, and, upon finding it filled, he conducted them into an ordinary car, where there were no vacant seats. On being requested to return the tickets, or procure for plaintiff something to show that he was entitled to a section in a sleeping car to N. Y., the porter refused to do so, and turned to go away, when plaintiff touched him lightly on the arm, saying to him he must not leave without some satisfaction, whereupon the porter struck plaintiff a violent blow in the face, knocking him down and injuring him. Defendant did not own the sleeping car of the first train, or hire or pay the porter. The complaint was dismissed on trial. This was held error, because the question whether the porter was engaged in the performance of his duties as defendant's servant, at the time of the assault, should have been submitted to the jury. *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 24 N. E. 319.

Porter Working under Exclusive Control of Sleeping Car Company.—But in *Chicago, etc., R. Co. v. Hamlen*, 215 Ill. 525, 74 N. E. 705, it is held that a porter employed and paid by a sleeping car company is not the servant of the railroad company hauling the car of which he is in charge, where he is not subject to the orders of the railroad company in any particular. This was a case where the validity of a contract between a sleeping car company and its servants, claimed to have the effect of relieving a railroad company from liability for personal injuries sustained by a porter employed by the sleeping car company, was attacked on the ground that the porter was a servant of the railroad company.

Z. VOLUNTEERS.

Volunteer, those working for another without hope of reward and with no interest in the work, are not the servants of those for whom they work, nor entitled to recover against the latter for injuries sustained through mere negligence.

Georgia.—*Atlanta, etc., R. Co. v. West*, 121 Ga. 641, 49 S. E. 711, 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548; *Manchester Mfg. Co. v. Polk*, 115 Ga. 542, 41 S. E. 1015; *Sparks v. East Tennessee, etc., R. Co.*, 82 Ga. 156, 8 S. E. 424.

Illinois.—*Chicago, etc., R. Co. v. Argo*, 82 Ill. App. 667.

Indiana.—*Stalcup v. Louisville, etc., R. Co.*, 16 Ind. App. 584, 45 N. E. 802.

Kentucky.—*Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

Massachusetts.—*Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996.

Minnesota.—*Church v. Chicago, etc., R. Co.*, 50 Minn. 218, 52 N. W. 647.

Missouri.—*Chaney v. Louisiana, etc., R. Co. (Mo.)*, 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333, 75 S. W. 595.

Ohio.—*Cleveland, etc., R. Co. v. Marsh*, 63 O. St. 236, 58 N. E. 821.

Pennsylvania.—*Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

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Virginia.—*Taylor v. Baltimore, etc., R. Co. (Va.)*, 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776, 62 S. E. 798.

Where a mere volunteer, that is one who has no interest in the work, undertakes to assist, the servant of another, the maxim respondeat superior does not apply, and he does so at his own risk. *Chicago, etc., R. Co. v. Argo*, 82 Ill. App. 667.

The relation of master and servant cannot exist in such a sense as to create the duty of employer and employee without the express or implied assent of both parties. No one can intrude himself into the service of another independently of such person's consent or acquiescence. *Chicago, etc., R. Co. v. Argo*, 82 Ill. App. 667.

Head Brakeman Left in Charge of Switching—Bystander Requested to Assist.—A construction train of defendant having pulled into a station in charge of a conductor, he left the train to attend to his usual duties at the station, leaving the trainmen to do some switching, so as to transfer some of the cars, the "head brakeman" having charge of the switching of the train. At the request of such "head brakeman," plaintiff, a bystander, got on the cars to assist in the switching, and while doing so sustained injuries caused by the movement of certain car trucks which were loaded on one of the cars, and which were not properly blocked. It was held that such brakeman had no authority to employ additional men to assist in switching, and the fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that if any one on the ground had such authority, it was the conductor; and that plaintiff was a mere volunteer, and assumed all the risks of the situation. *Church v. Chicago, etc., R. Co.*, 50 Minn. 218, 52 N. W. 647.

Riding on Mixed Train by Consent of Conductor and Assisting in Unloading.—In *Chaney v. Louisiana, etc., R. Co. (Mo.)*, 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333, 75 S. W. 595, it is held that one who is acquainted with the conductor and brakeman on a mixed train, and for several years has ridden once a week thereon without paying fare, but rendering assistance in handling baggage and unloading cars, etc., is not an employee of the railroad company.

Volunteer Baggage Man—Implied Acceptance of Service.—The acts of plaintiff, who voluntarily assumed to act as baggage man on defendant's train, were not of such continuous, definite, and prominent character as to imply notice of and acceptance of such service by defendant railroad. *Wagen v. Minneapolis, etc., R. Co. (Minn.)*, 17 Am. & Eng. R. Cas., N. S., 438.

Detached Portion of Train Run to Water Station by Fireman—Boy Requested to Turn on Water.—A train of defendant coming into a city, the engine tender and one of the cars were detached from the remainder, and run under the charge of the fireman, to a water station of defendant. At such station, the fireman asked a boy ten years old, standing there, to turn on the water, while he

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was climbing on the tender to put in the hose, the remainder of the train came down with its ordinary force, struck the car attached to the engine, and the jar threw the boy under the car wheel and he was killed. It was held that it not being within the scope of the engineer's or fireman's employment to ask any one to come to the engine to assist them, defendant was not liable. So held in *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

Boy Working for Amusement in Saw-House with Knowledge of Owner.—A boy of fourteen went upon premises used as a saw-house and box factory, solely for his own amusement, and, while assisting a workman who was sawing slabs with a circular saw, the upper part of which was exposed, by taking, with the latter's direction, the pieces of wood from the saw as they were cut and throwing them upon the floor or into a wagon, was injured by coming in contact with the saw in reaching across it to get a piece of wood. He had been accustomed for some time to visit the premises and to amuse himself by riding in the wagons and by assisting the workmen, in the presence of the owner of the factory, who had himself on one or two occasions directed him to load some boxes, and shortly before the accident happened the owner saw him helping to load slabs into a wagon to be taken to the saw-house. It was held that the boy was only a licensee and volunteer. *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996.

Assisting at Request of Man in Charge of Work—Expecting No Pay.—But in *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, it is held that one who, at the request of the man in charge, temporarily assists in defendant's work, not expecting any pay, is for the time being a servant of the defendant and entitled to the same protection as any other servant.

Receiving Benefit of Gratuitous Labor without Objection.—And when one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his services, he is liable as a master for the negligence of such servant, even though he has not employed or paid him. *Denver, etc., R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505.

Volunteering to Perform Service with Assent of Corporation's Agent.—And if a person undertakes voluntarily to perform a service for a corporation, and an agent of the corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so engaged, and the rule that a master is not liable to his servant for an injury occasioned by the negligence of a fellow servant in the course of their common employment applies to such volunteer. So held in *Barstow v. Old Colony R. Co.*, 143 Mass. 535, 10 N. E. 255.

Assisting to Make up Train by Direction or Permission of Yard-master.—So in *Central Trust Co. v. Texas, etc., Ry. Co. (C. C. A.)*, 32 Fed. Rep. 448, it is held that a person who without pay assists as a brakeman in making up a railroad train by the direction or

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with the express permission of a yardmaster, who has authority to employ necessary assistants in his department, is a servant of the company; and it will be liable to him for an injury resulting from the use of a defective brake.

Minor Resuming Work after Being Paid Off—Knowledge of Superintendent—Absence of Objection.—And in *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447, it is held that where a minor, after quitting his employment and being paid off, again went to work at the mine, and was killed by falling into a shaft not properly guarded by gates, it was not error to instruct the jury that if he so went to work with knowledge of and without objection on the part of the superintendent of the mine who was in charge of the work, then the relation of employer and employee existed as between the owners of the mine and the deceased.

Minor Acting as Brakeman by Direction of Conductor Gratuitously.—And in *Louisville, etc., R. Co. v. Willis*, 83 Ky. 57, it is held that a father is entitled to recover of a railroad company for an injury received by his minor son while rendering the company services as brakeman, under the direction of the conductor, although the son was not employed by the company for wages. In this case it is said in the opinion: "The conductor knew from his appearance that he (the son) was under age, and he received and used him. This was an exercise of dominion and illegal control of him by the general agent of the appellant (the railroad) at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since, it was its duty to know that the appellee was willing for it before it took control of him."

AA. VOLUNTARILY ASSISTING SERVANT OF ANOTHER.

Where one assists the servant of another, at the latter's request, to perform a service for the latter's master, the relation of master and servant between such volunteer and such master is not thereby created, unless it is shown that the servant had authority to employ an assistant, or that the person assisting him had so much interest in the work as to prevent him from being a mere volunteer in effecting its performance.

Alabama.—*Brown v. Scarboro*, 97 Ala. 316, 12 So. 289; *McDaniel v. Highland Ave., etc., R. Co.*, 90 Atl. 64, 8 So. 41.

Arkansas.—*Railroad Co. v. Dial*, 58 Ark. 318, 24 S. W. 500.

Georgia.—*Atlanta, etc., R. Co. v. West*, 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548, 121 Ga. 641, 49 S. E. 711; *Rhodes v. Georgia, R., etc., Co.*, 84 Ga. 320, 10 S. E. 922; *Sparks v. East Tennessee, etc., Ry. Co.*, 82 Ga. 156, 8 S. E. 424.

Kansas.—*Atchison, etc., R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703.

Kentucky.—*Clark v. Louisville, etc., R. Co. (Ky.)*, 30 R. R. R.

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542, 53 Am. & Eng. R. Cas., N. S., 542; Kentucky Cent. R. Co. *v.* Gastineau, 83 Ky. 119.

Minnesota.—Church *v.* Chicago, etc., R. Co., 50 Minn. 218, 52 N. W. 647.

New Jersey.—Longa *v.* Stanley Hod Elevator Co., 69 N. J. L. 31, 54 Atl. 251.

New York.—Geibel *v.* Elwell, 19 N. Y. App. Div. 285, 46 N. Y. S. 76.

North Carolina.—Vassor *v.* Atlantic C. L. R. Co. (N. C.), 25 R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629, 43 S. E. 849.

Pennsylvania.—Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210; Wischam *v.* Richards, 136 Pa. St. 109, 20 Atl. 532.

Texas.—Bonner *v.* Bryant, 79 Tex. 540, 15 S. W. 491.

Utah.—Mickelson *v.* New East Tintic R. Co. (Utah), 20 Am. & Eng. R. Cas., N. S., 855, 64 Pac. 463.

Virginia.—Taylor *v.* Baltimore, etc., R. Co. (Va.), 31 R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776, 62 S. E. 798.

Wisconsin.—Hendrickson *v.* Wisconsin Cent. R. Co. (Wis.), 33 R. R. 340, 56 Am. & Eng. R. Cas., N. S., 340, 122 N. W. 758.

Volunteer Working at Unauthorized Request of Employee.—In Atlanta, etc., R. Co. *v.* West, 14 R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548, 121 Ga. 641, 49 S. E. 711, it is held that where a volunteer engages in work undertaken in compliance with an unauthorized request of an employee of defendant, the latter owes him none of the obligations of a master toward a servant.

Riding on Freight Train by Permission of Conductor and Assistant to Unload.—In Vassor *v.* Atlantic C. L. R. Co. (N. C.), 25 R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629, 43 S. E. 849, it appeared that plaintiff boarded defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train. The conductor replied that he could, and that he was to help unload and load freight. Plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter. It was held that the conductor had no authority to employ plaintiff as a servant or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty owing to a passenger or an employee.

Shipper on Top of Car, at Conductor's Direction, to Signal Other Cars.—In Atchison, etc., R. Co. *v.* Lindley, 42 Kan. 714, 22 Pac. 703, it is held that where a shipper of stock was on a freight train accompanying two loads of his stock, and while the train was stopping at a station the conductor addressed the shipper as follows: "You get on top and help signal until the last load of hogs comes up, and we will water them," and the shipped voluntarily obeyed this order or direction and got upon the train moving backwards and while on the top of the train near the end of the car, watching a brakeman trying to make a coupling, was severely injured by a

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sudden forward motion or jerk of the train, without any warning thereof. It was held that as the shipper voluntarily placed himself in a position of known danger, and as he was not upon the top of the train to look after or care for his stock, the railroad company is not liable in damages for his injuries.

Passenger Cleaning Headlight at Request of Fireman.—When a passenger at the request of the fireman of the train undertakes to clean the headlight on the engine, he does not thereby loose the status of a passenger and become an employee of the railroad. *Brown v. Scarboro*, 97 Ala. 316, 12 So. 289.

Person Assisting Conductor to Unload Cars—Absence of Promise or Expectation of Reward.—In *Taylor v. Baltimore, etc., R. Co. (Va.)*, 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776, 62 S. E. 798, it is held that where a freight conductor called to a third person to assist him in unloading cars at a station, because his train was late and his men out of place, and such person complied with the request, the existence of the relation of master and servant did not exist between him and the railroad, he performing the work without either promise or expectation of reward.

Person Assisting Conductor to Repair Car Brake.—In *Hendrickson v. Wisconsin Cent. R. Co. (Wis.)*, 33 R. R. R. 340, 56 Am. & Eng. R. Cas., N. S., 340, 122 N. W. 758, it is held that where one was assisting defendant's conductor to repair a car brake, and the conductor had no express authority to employ plaintiff, and there was no sudden emergency necessitating plaintiff's employment, plaintiff could not recover for injuries sustained through the negligence of the railroad's servants on the theory that he was acting as its servant at the time of the injury.

Applying Brakes on Car on Switch—Collision.—The complaint showed that the plaintiff, who was casually passing, at the request of an employee of defendant, got upon a car that was moving slowly upon a switch, and applied the brakes to stop it; and that, while so engaged, other servants of defendant carelessly caused other cars of the defendant to collide with that upon which the plaintiff was. It was held that the plaintiff was a mere intermeddler, to whom the defendant owed no duty, either as employee or passenger. *Everhart v. Terre Haute, etc., R. Co.*, 4 Am. & Eng. R. Cas. 599, 78 Ind. 292, 41 Am. Rep. 567.

Boy Assisting in Moving Car at Request of Employees.—A boy of thirteen years in assuming to assist the employees of a railroad company, at their request, in moving a loaded car without the knowledge, consent or authority of the company, was a mere volunteer. *Rhodes v. Georgia R., etc., Co.*, 84 Ga. 320, 10 S. E. 922.

Conductor of Private Freight Cars Uncoupling at Request of Railroad's Conductor.—Plaintiff, a conductor of private freight cars and not in the employ of the railroad company, at the request of the latter's conductor of the train, cut loose the cars following his own; and fell off the train and was injured. It was held that the

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plaintiff, after performing the duty he voluntarily undertook, having resumed his proper place as a passenger, became entitled to the protection which such relation gave him. *Cumberland Valley R. Co. v. Myers*, 55 Pa. St. 288.

Carter, Waiting to Receive Load of Cotton for His Master, Assisting Another's Carter to Load.—In *Potter v. Faulkner* (Eng.), 101 E. C. L. R. (1 B. & S.) 800, it appeared that defendant's porters were lowering bales of cotton from the defendant's warehouse and his carter was receiving them into his wagon; that plaintiff, who was waiting with another wagon to receive a load of cotton for his master, at the request of the defendant's carter, assisted him, and, in consequence of the negligence of defendant's porters, a bale of cotton fell upon and injured him. It was held that defendant was not liable. In this case Erle, C. J., said: "The plaintiff intervened to assist the servant who was in the cart, and, so far as the master was concerned, was a volunteer upon the occasion and was injured by what was found to be negligence of defendant's servants in the warehouse. The question is can the plaintiff, under the circumstances, sue the master for the negligence of his servant. This is the case of one who volunteers to associate himself with the defendant's servants in the performance of his work, and that without the consent of or knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself, in respect to their master's liability. He can impose no greater obligation upon the master than that to which he was subject in respect to a servant in his actual employ; and it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above."

BB. VOLUNTEER FELLOW SERVANT OF SERVANT HE ASSISTS.

It has been held that a person who has no interest in the work when assisting a servant at his request, is so far his fellow servant as to be precluded from recovering against the master for injuries sustained through the servant's negligence. *Osborne v. Knox*, etc., R. Co., 68 Me. 49, 19 Am. Ry. Rep. 7; *Welch v. Boston* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35, 90 N. W. 521; *Jackson v. Southern Ry.* (S. Car.), 21 R. R. R. 552, 44 Am. & Eng. R. Cas., N. S., 552, 54 S. E. 231; *Mayton v. Texas*, etc., R. Co., 63 Tex. 77; *Texas*, etc., R. Co. *v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Volunteer Assisting in Railroad's Work.—One who has no interest in the performance of certain work for a railroad, but volunteers to assist in such work, assumes all risks incident to his position, and cannot recover for injuries caused by the negligence of the railroad employees, his fellow servants for the time being. So held in *Easen v. S. & E. T. R. Co.*, 65 Tex. 577, 579.

Volunteer Injured by Negligence of Servant He Assists.—A per-

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son who voluntarily assists a servant, in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on the master than a hired servant. *Osborne v. Knox, etc.*, R. Co., 68 Me. 49, 19 Am. Ry. Rep. 7.

Servant of Another Company Directed by Conductor to Remove Skids.—In *Welch v. Boston, etc., R. Co. (Mass.)*, 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35, 90 N. W. 521, it is held that where the conductor of a train told decedent, a servant of another company, to remove certain skids, if this was recognized and obeyed as a command, they became fellow servants.

Bystander Called on by Station Agent to Push Cars from Fire.—In *Jackson v. Southern R. (S. Car.)*, 21 R. R. R. 552, 44 Am. & Eng. R. Cas., N. S., 552, 54 S. E. Rep. 231, it is held that where a bystander on the occasion of a fire at a railway station is called in by the station agent to assist in pushing cars from the fire, he is a fellow servant of a section hand engaged in the same work, and if injured by the latter's negligence, the railroad company is not responsible.

Volunteer Assisting in Managing Cars.—In *Mayton v. Texas, etc., R. Co.*, 63 Tex. 77, it is held that where a person volunteers to assist the employees of a railroad company in managing its cars, and is injured by the train, he, in respect to the liability of the railroad company for his injury, stands in the same position as those with whom he thus associated himself, he having no personal interest in the operation of the train.

Volunteering to Perform Services on Train at Request of Foreman of Train Gang—Fellow Servant of Engineer and Foreman.—In *Texas, etc., Ry. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001, it is held that one who voluntarily undertakes to perform a service while on the train which he is under no obligation to perform, although undertaken at the request of the foreman of the train gang, thereby becomes a fellow servant with the engineer and foreman, and if injured cannot recover for their negligence.

Question for Jury.—Whether a bystander is a fellow servant with a station agent, who calls him in to assist in rolling cars away from a fire, is a question for the jury. So held in *Jackson v. Southern Ry. (S. C.)*, 26 R. R. R. 769, 49 Am. & Eng. R. Cas., N. S., 769, 58 S. E. 605.

CC. PERSONS HAVING INTEREST IN PERFORMANCE OF WORK ASSISTING SERVANTS.

Persons assisting servants, either with or without their request, where they have an interest in the performance of the work, are neither mere volunteers, nor the fellow servants of those they assist, so as to preclude them from recovering against the master of the latter for injuries sustained while so rendering assistance.

Minnesota.—*Mayer v. Kenyon-Rosing Mach. Co. (Minn.)*, 104 N. W. 132.

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New York.—*Marks v. Rochester R. Co.*, 77 Hun 77, 28 N. Y. S. 314.

Ohio.—*Cleveland, etc., R. Co. v. Marsh*, 63 O. St. 236, 58 N. E. 821; *McIntyre R. Co. v. Bolon* (Ohio), 21 Am. & Eng. R. Cas. 501.

Pennsylvania.—*Wischam v. Rickards*, 136 Pa. St. 109, 20 Atl. 532.

Tennessee.—*Railroad v. Ward*, 98 Tenn. 123, 38 S. W. 727.

Texas.—*Easen v. S. E. Ry. Co.*, 65 Tex. 577, 579; *Weatherford, etc., Ry. Co. v. Duncan*, 88 Tex. 611, 32 S. W. 878.

England.—*Holmes v. Northeastern R. Co.*, L. R. 4 Exch. 254, 38 L. J. Ex. 161, 20 L. T. 616, 17 W. R. 800; *Wright v. London, etc., R. Co.* (Eng.), 33 L. T. 830, L. R. 1 Q. B. Div. 253, 45 L. J. Q. B. D. 570.

In *Cleveland, etc., R. Co. v. Marsh*, 63 O. St. 236, 58 N. E. 821, it is held that one who is invited by a servant of a railroad in charge of its work or service to assist him therein, and does so with some purpose or benefit to be subserved in his own behalf in addition to the purpose of so assisting, is not a volunteer, and is entitled while so assisting to be protected against the negligence of the servants of the railroad company.

In *Easen v. S. E. T. Ry. Co.*, 65 Tex. 577, it is held that if the injured person is not a volunteer, but engaged at the request or permission of the railroad's agent in a transaction of interest as well to himself or his master as to the railroad company, he is entitled to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. In this case it is said in the opinion: "The principle upon which a recovery is allowed is this: 'The injured person is not a volunteer, but engaged at the request or permission of the railway's agents in a transaction of interest as well to himself and his master as to the railroad company; and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs. Though performing a service beneficial to both, he is doing so in his own behalf, and not as a servant of the company. Their request or acquiescence gives him the right to perform the service, the fact that he acts in his own behalf, however beneficial his labor may be to the company, gives him the right to be protected against the negligence of the company's servants.'"

Passenger Assisting to Back Street Car upon Switch.—In *McIntyre Ry. Co. v. Bolton* (Ohio), 21 Am. & Eng. R. Cas. 501, where a passenger on a street car voluntarily assisted the driver in backing the car upon a switch, so that another car coming in an opposite direction could pass, and was injured through the negligence of the driver of the latter car, he was allowed to recover damages of the street car company; as he was not a mere volunteer, and could not be considered a fellow of the driver of the car which struck him.

Owner of Freight Assisting in Its Delivery.—In *Holmes v. North-*

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eastern R. Co., L. R. 4 Exch. 254, 38 L. J. Ex. 161, 20 L. T. 616, 17 W. R. 800, where the owner of freight transported by a railroad company was allowed to assist in its delivery, and, in so doing, was injured through the carelessness of the company's servants, it was held that he could recover against the company, as he was not in the position of its employee. See also, *Wright v. London, etc., R. Co.*, 33 L. T. 830, 1 Q. B. Div. 253, 45 L. J. Q. B. D. 570.

Shipper Assisting to Shunt Car on Siding in Order to Unload His Stock.—In *Wright v. London, etc., R. Co.*, 33 L. T. 830, L. R. 1 Q. B. Div. 253, 45 L. J. Q. B. D. 570, it appeared that plaintiff shipped a heifer in a box-car of defendant's road, and took passage on the same train himself. On arriving at the station, the car was shunted on a siding to get the heifer off. There were only one or two porters available to shunt the box-car, and the plaintiff assisted in shunting the car to the side track to get the heifer off, and, while so doing, the box-car was run into by a train, through the negligence of defendant's servants, and the box-car was driven against plaintiff and injured him. It was held that defendant was liable for the injury, because plaintiff was not acting merely as a volunteer, and he was not a fellow servant, but was only assisting in the delivery of his own goods, on his own behalf.

Representative of Purchasers Assisting to Adjust Parts of Engine.—Plaintiff, who represented himself and the purchasers of a threshing machine engine, was not a mere volunteer in assisting to adjust certain parts thereof at the request of defendant's servants. *Mayer v. Kenyon-Rosing Mach. Co. (Minn.)*, 104 N. W. 132.

Employee of Shipper Killed While Putting on Brakes to Prevent Collision with Railroad's Cars in His Charge.—In *Weatherford, etc., R. Co. v. Duncan*, 88 Tex. 611, 32 S. W. 878, it appeared that D. was killed in a collision caused by the railway employees cutting loose three or four freight cars upon a side track, at dangerous speed, which collided with cars upon the switch under the control of deceased. He was an employee of a coal mining company, and conducted the work of weighing and loading coal from a chute at the switch upon cars furnished by the railroad company. On seeing the danger from the approaching cars, he mounted a car standing on the track in order to put on the brakes and prevent a collision upon the car which was at the chute and partly loaded. It was held that D. was not a volunteer in attempting to protect from injury the cars under his charge, and that he was in the line of his duty to the coal company, and not serving the railroad company.

Shippers' Employee Assisting to Place Car for Loading.—In *Railroad v. Ward*, 98 Tenn. 123, 38 S. W. 727, it is held that one employed by shippers to load potatoes from wagons into cars placed on side tracks, does not become a fellow servant with the trainmen so as to defeat his recovery for an injury caused by the negligence of the engineer, when he, not as a mere volunteer in the

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service of the railroad company, but for the purpose of expediting his employers' business, assists, at the request, or with the consent, of the brakeman, in placing a car in a convenient place for loading, and is negligently injured while thus engaged.

Volunteer Assisting in Loading Car.—In *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491, it is held that "where one having no interest in the loading of a car, or the carriage and delivery of passengers or freight, volunteers to assist in reference to such matters, and while thus engaged is injured, he stands in the same position as a regular employee engaged in the particular service, so far as the right to recover for his injuries is concerned. But the case is different when the injured party was acting at the time in furtherance of his own or his master's business." See also, *Easen v. S. & E. T. Ry. Co.*, 65 Tex. 577, 579.

Employee Volunteering to Assist in Order to Expedite Master's Work.—In *Wischam v. Rickards*, 136 Pa. St. 109, 20 Atl. 532, it is said in the opinion: "There is, however, a feature of the subject which requires consideration, and it is that which makes this case so exceedingly close. It is illustrated in the case of *Abraham v. Reynolds*, 5 H. & N. Exch. 142. There the plaintiff, a servant of the I. & Co., who was employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when, in consequence of the negligence of defendant's porters in lowering the bales from the upper floor of the warehouse, a bale fell upon him. Held, that the plaintiff and defendants' servants, not being under the same control or forming part of the same establishment, were not so employed upon a common subject as to deprive the plaintiff of a right of action against the defendants for such negligence. The facts found by the assessor were that the plaintiff went to the warehouse of the defendants to receive cotton bales into his wagon and carry them to his employers; that the cotton was in a room on the fifth floor, and was lowered by the defendants' servants into the lorry below. The plaintiff brought his lorry under the warehouse and received three or four bales, when one of the defendants' men called to him to pull in a bale. While he was doing so another bale fell upon him from above. It was argued that there should be no liability on the part of defendants, the owners of the warehouse, because the plaintiff was engaged in a common service with the defendants' servants. But the court held otherwise, substantially on the ground that the plaintiff was merely acting for his own master, and was necessarily present for the purpose of receiving the cotton, and therefore had no relation with the defendants."

DD. VOLUNTEER NOT FELLOW SERVANT OF SERVANT
HE ASSISTS.

But it has been held that one assisting a servant at his request is not his fellow servant, so as to be prevented by the fellow

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servant rule from recovering against the master, if such assistant has a material interest in the performance of the work. *Geibel v. Elwell*, 19 N. Y. App. Div. 285, 46 N. Y. S. 76; *Bonner v. Bryant*, 1 Tex. Civ. App. 269, 21 S. W. 549.

Person Having Contract to Furnish Railroad with Wood Requested by Brakeman to Assist in Pushing Loaded Cars.—Appellee was in the employ of B., who had a contract with the appellants to furnish them wood. While engaged in loading appellants' cars with wood, appellee was requested by a brakeman to assist him in pushing two loaded cars to the caboose, and was directed by the brakeman to get between the two cars, which were coupled together, in order to move them easily. He did so, and while pushing the cars, which were slowly moving, the brakeman mounted one of them, upon which was a set brake, and, without warning or notice to appellee, unfixed the brake, whereby the cars were caused to move suddenly forward, and caught appellee's foot and crushed his leg. It was held that appellee was not a fellow servant of the brakeman, and thereby precluded from recovery. In this case the trial court in substance charged that appellee was in B's employment; and that it was not his duty to push the cars, or to assist in doing so, unless such aid was reasonably necessary to expedite B's business and in furtherance thereof; and that if he pushed the cars only in response to the brakeman's request, and as an accommodation to him, and not because it was necessary to the furtherance of B's business, as an act reasonably incident to appellee's duties to B., then he would be a volunteer and could not recover. But if the brakeman requested or directed appellee to assist in removing the cars, in order to make up the train, and if appellee did so as an act reasonably necessary in loading the train, and moving the wood for B., appellee could recover, if he was hurt through the negligence of the brakeman. It was held that such charge fairly submitted the issue to the jury. *Bonner v. Bryant*, 1 Tex. Civ. App. 269, 21 S. W. 549.

Boys Casting Off Stern Line of Brig by Request of Mate.—The mate of a brig lying at a pier, which had been loosed from all her moorings except the stern line, called to some boys who were playing upon the pier to cast off the stern line. It was held that the mere gratuitous rendering of such service by the boys did not create, as between them and those on the brig, the relation of fellow servants. *Geibel v. Elwell*, 19 N. Y. App. Div. 285, 46 N. Y. S. 76.

EE. LEARNERS WORKING FOR RAILROADS WITHOUT PAY.

It is generally held that one working for a railroad, though without pay, for the purpose of learning the duties of a certain branch of the railroad service, is to be deemed a servant of the company. *Huntzicker v. Illinois Cent. R. Co.* (C. C. A.). 11 R. R. R. 555, 34 Am. & Eng. R. Cas., N. S., 555; *Alabama Great So. R. Co. v. Burks* (Ala.), 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562, 41 So.

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638; *Weisser v. Southern Pac. R. Co.*, 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861, 148 Cal. 426, 83 Pac. 439; *Smith v. Western, etc., R. Co. (Ga.)*, 36 R. R. R. 230, 59 Am. & Eng. R. Cas., N. S., 230, 67 S. E. 818; *Atchison, etc., R. Co. v. Fronk (Kan.)*, 22 R. R. R. 95, 45 Am. & Eng. R. Cas., N. S., 95, 87 Pac. 698; *Millsaps v. Louisville, etc., R. Co.*, 69 Miss. 423, 13 So. 696.

Student Brakeman.—In *Alabama Great So. R. Co. v. Burks (Ala.)*, 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562, 41 So. 638, it is held that a person learning the duties of brakeman was an employee of the railroad company, though he received no wages.

In *Weisser v. Southern Pac. R. Co.*, 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861, 148 Cal. 426, 83 Pac. 439, it is held that a student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other trainmen, although he was receiving no pecuniary compensation.

"Learner" Brakeman—Promise of Job.—In *Alabama Great So. R. Co. v. Burks (Ala.)*, 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562, 41 So. 638, it is held that one acting as a railroad brakeman, on an understanding with the railroad that he should receive no stipulated wages while learning the duties of a brakeman, but should be given a position after becoming proficient, was a servant.

Student Brakeman—Agreement to Perform Other Services.—In *Atchison, etc., Ry. Co. v. Fronk (Kan.)*, 22 R. R. R. 95, 45 Am. & Eng. R. Cas., N. S., 95, 87 Pac. 698, it is held that a student brakeman, who, in consideration of being permitted to ride on a freight train to learn the duties of a freight brakeman, agrees to perform services on its engines, trains, and cars, while learning such duties, is an employee of the railroad company.

Trainmaster's Permit to Ride on Trains to Learn Duties of Flagman.—In *Huntzicker v. Illinois Cent. R. Co. (C. C. A.)*, 11 R. R. R. 555, 34 Am. & Eng. R. Cas., N. S., 555, it is held that a person holding the trainmaster's permit to ride on freight trains in the district to acquire familiarity with the duties of a flagman was an employee of the railroad company when killed in a collision between its trains, while riding on one of them with its conductors' assent.

Learner Fireman.—One who by permission of the railroad company acts as fireman of its locomotive, is a servant of the company, though he works without compensation, merely to learn the business. *Millsaps v. Louisville, etc., R. Co.*, 69 Miss. 423, 13 So. 696.

Apprentice Fireman Working without Pay.—In *Smith v. Western, etc., R. Co. (Ga.)*, 36 R. R. R. 230, 59 Am. & Eng. R. Cas., N. S., 230, 67 S. E. 818, it is held that an apprentice fireman, while working as such on a locomotive, though without pay, is a servant of the railroad company, and a fellow servant with the regular servants employed in the operation of the train on which he is engaged.

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Apprentice Fireman Selected by Conductor and Engineer without Authority.—But if only certain agents or employees of a railroad company had the authority to select "learner" or apprentice firemen, and to permit them to go upon the engines of the company with a view to learn the duties of a fireman, and if the engineer and conductor of a train permit a person to go upon their train and act as a "learner" fireman, they having no such authority, his presence upon the engine would not thereby become lawful, and he could not claim to be there as an employee of the railroad. So held in *Smith v. Western, etc., R. Co. (Ga.)*, 36 R. R. R. 230, 59 Am. & Eng. R. Cas., N. S., 230, 67 S. E. 818.

FF. MISCELLANEOUS.

Servant of Two Masters.—In *Dean v. East Tenn., etc., R. Co.*, 98 Ala. 586, 13 So. 489, it is held that the relation of master and servant may exist between an employee and two masters, when in the common service of both he is subject to the control of the joint authority, and when in the service of one, he is subject to the authority and control of that one alone.

One of Joint Employers Acting as Workman.—Although between joint employers one of them takes upon himself the function of a workman, the relation of master and servant continues to exist between him and their employees. *Rhoades v. Varney*, 91 Me. 222, 39 Atl. 552.

Same Person Receiver of One Railroad and Lessee of Another—Employee Injured by Negligence in Operating Leased Road—Action—Leave of Court.—In *Lyman v. Central Vt. R. Co.*, 59 Vt. 167, 10 Atl. 346, it is held that when the same person is receiver of one railroad and lessee of another, and both are operated by him together, the leased road is not receivership property, and an employee can maintain an action of law against the receiver without leave of the court of chancery, to recover for injuries resulting from the negligence of his servants in operating the leased road.

Servant Injured While Being Conducted to Work by Manager to Dangerous Part of Premises.—A master's responsibility for injury to an employer, sustained by reason of unsafe condition of premises, will not be affected by the fact that when the accident occurs the servant is not in the actual employ of the master, but is being conducted by the master's manager to that portion of the premises where the danger exists and where the master proposes to employ such servant. So held in *Powers v. Calcasieu Sugar Co.*, 48 La. 483, 19 So. 455.

Servant of Railroad Company Not Servant of Foreign Company of Same Name.—In *St. Louis, etc., Ry. Co. v. Smith (Ark.)*, 8 R. R. R. 1, 31 Am. & Eng. R. Cas., N. S., 1, 73 S. W. 101, it is held that a servant employed by a corporation created under the laws of one state, and operating a railroad commencing at the terminus of a railway company of the same name, organized under the laws of an-

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other state, could not hold the latter company liable for the services so rendered; the two companies being distinct, and there being no evidence that they were jointly liable.

Agreement to Occupy Section House and Board Railroad's Employees—Railroad Aiding to Collect Board.—An agreement between a railroad and an individual that the latter shall occupy a section house of the company, and shall board there the section hands and other employees of the company at an agreed rate, the company to aid in collecting the payment out of the wages of the employees, does not create the relation of master and servant between the company and such individual. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 37 L. Ed. 223.

Assistant Employed by Authorized Employee—Compensation in Proportion to Work.—The relation of master and servant exists where the latter is employed not by the master directly, but by an employee in charge of a part of the master's business with authority to engage assistants therein; and the fact that the subordinate employee receives compensation proportioned to the work done does not alter the case. So held in *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355, 363.

Express Messenger While in Express Car.—In *Chicago, etc., R. Co. v. O'Brien* (C. C. A.), 14 R. R. R. 227, 37 Am. & Eng. R. Cas., N. S., 227, 132 Fed. Rep. 593, it is held that an express messenger, while riding in a car furnished by a railroad company to the express company by which he is employed, under a contract by which the employees therein are carried free, occupies a relation to the railroad company analogous to that of its own employees.

Express Messenger Working as Baggage Man—No Express Contract.—In *Missouri, etc., Ry. Co. v. Reasor* (Tex.), 3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281, 68 S. W. 332, an action against a railroad for injuries sustained by plaintiff while working on one of defendant's trains as an express messenger, and also as baggageman for defendant, it is held that an express contract was not necessary to create the relation of master and servant, and that the relation existed if the plaintiff, with the knowledge, consent, and approval of the defendant, acted as baggageman, and in that capacity performed duties which defendant owed to the public.

Same—Same—Same—Evidence—Deduction from Wages by Express Company.—In *Missouri, etc., Ry. Co. v. Reasor* (Tex.), 3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281, 68 S. W. 332 it is held that where, in an action against a railroad for injuries sustained by plaintiff while acting as an express messenger, and also as baggageman for defendant, it was in issue whether plaintiff was employed by the railroad, it was proper to admit evidence that the express company deducted from the wages of the plaintiff and of all other employees who acted both as messengers and baggagemen the sum of 50 cents per month as hospital fees for the defendant's hospital, the fee not being deducted where the employee acted only as messenger.

Note

Lessee Railroad Allowing Joint Use of Tracks by Another Company—Switchmen Joint Employees under Agreement.—The N. railroad company, lessee of the G. railroad company, granted to the P. railroad company the right to use the G. railroad jointly with the N. railroad, under an agreement which provided that during its continuance the P. railroad company should pay the N. railroad company a stipulated proportion of the rental of the G. railroad, and the expense of maintaining the tracks, bridges and property used jointly, including the wages of the switchmen and other employees; and the agreement further provided that as the employees conducting the business were joint employees and were paid by each party in proportion to the business done by it, that each party should be responsible for the acts of such employees when engaged in that party's business; and finally, that the N. company should incur no additional responsibility from the fact that such employees were hired or paid by it. An engineer employed by the P. company having been injured by the alleged negligence of a switchman employed on the G. road, he brought an action against the N. company. It was held that the switchman was, under such agreement, the employee of the N. company; and that, therefore, the defense that the injury was caused by the act of a fellow servant was not tenable. *Strader v. New York*, etc., R. Co., 86 Hun 613, 33 N. Y. S. 761.

Railroad Porter Assisting Express Messenger to Unload—Common Arrangement.—In *San Antonio*, etc., R. Co. v. Taylor (Tex. Civ. App.), 35 S. W. 855, it is held that a complaint in an action by a railroad porter against the railroad company and an express company for injuries received by him while assisting an express messenger to unload goods from an express car, alleging that defendant had a common arrangement for unloading express matter, whereby the servants of one company assisted those of the other; and that the injury was caused by the negligence of the express messenger in unloading some of the goods, showed that plaintiff and such messenger were fellow servants.

Towerman at Intersection Employed by Station Agent, Employed Jointly by Railroads, and Paid by Latter.—In *Stever v. Ann Arbor* R. Co. (Mich.), 35 R. R. R. 337, 58 Am. & Eng. R. Cas., N. S., 337, 125 N. W. 47, it is held that where two railroads operating roads crossing each other employed jointly a station agent to perform the usual duties of a station agent, with no general powers to prescribe rules for the performance of the duties of the towerman in charge of the semaphore and interlocker at the crossing, and the railroads prescribed rules for the guidance of the towerman and each paid half of his compensation, the mere fact that the station agent employed the towerman did not prevent the latter from being a servant of the railroads.

Woman Employed by Foreman of Railroad's Bridge Crew to Board Hands in Car—Aided by Railroad in Collecting Board.—In *Tinkle v. St. Louis*, etc., R. Co. (Mo.), 30 R. R. R. 470, 53 Am. & Eng. R.

Note

Cas., N. S., 470, 110 S. W. 1086, it is held that one employed by the foreman of a bridge crew of a railroad company to board the men in cars furnished by the railroad, under an agreement that each man should pay a specified sum per day for board, and, in case any of the men failed to pay, the company would deduct the same from their wages, is in a sense in the service of the company, in that what she was employed to do and was doing was for the convenience of the employees of the company, and the company owes to her the same duty it owes to any employee not engaged in operating the train but riding thereon in the business of the company.

Injured Employee Transported to His Home by Railroad.—After an injured railroad employee had been carried to a station and had been attended to by a physician and a friend, the injured man, in relation to his transportation by the railroad from such station to his home, in the railroad's baggage car, occupied the position of a stranger to the company in like condition. So held in Baltimore, etc., *R. Co. v. State*, 41 Md. 268, 6 Am. R. Rep. 276.

Laborer Employed by Highway Surveyor Not Servant of Town.—A town is not liable for an injury sustained by reason of the negligence of a laborer employed by one of its highway surveyors, to aid in performing the duties of his office, as the maxim respondeat superior is not applicable. *Hood v. Mayor*, etc., 83 Mass. (1 Allen), 101.

News Company's Agent While Riding on Train.—In *Smallwood v. Baltimore*, etc., *R. Co. (Pa.)*, 21 R. R. R. 290, 44 Am. & Eng. R. Cas., N. S., 290, 64 Atl. 732, it is held that where a railroad company and a news company entered into a contract by which an agent of the news company, employed to sell papers and fruit on trains, is permitted to ride thereon, he is employed on the trains, and is not a passenger, within Act April 4, 1868, § 1; and when killed by the negligence of an employee of the railroad company, no recovery can be had for his death.

Partners Organizing Corporation to Engage in Same Business—Status of Servant of Partnership.—In *Goodwin v. Smith*, 23 Ky. Law Rep. 1810, 66 S. W. 179, it is held that the fact that partners organized a corporation to engage in the same business in which the partnership was engaged is not evidence of a dissolution of the partnership and of the assumption of its business by the corporation; and therefore a servant of the partnership, who continued, after the corporation was organized, to work as before, without being discharged or re-employed, continued to be a servant of the partnership.

Person Employed by Railroad's Foreman and Sometimes Paid by Latter and Sometimes on Pay Roll.—Where a person was employed frequently during a year preceding his injury by a foreman of defendant railroad company and was paid part of the time by the foreman personally and part of the time was placed on the pay roll, he was in the employ of the railroad company, so that it owed him the

Note

duty of a master. So held in *Illinois Cent. R. Co. v. Timmons* (Ky.), 26 R. R. R. 462, 49 Am. & Eng. R. Cas., N. S., 462, 100 S. W. 337.

Railroad Leasing Cabs to Drivers.—In *McColligan v. Pennsylvania R. Co.* (Pa.), 20 R. R. R. 427, 43 Am. & Eng. R. Cas., N. S., 427, 63 Atl. 792, it is held that where a railroad owning cabs let them out to drivers for a fixed sum per day, the agreement providing that the driver assumed all liability for damages to any person or property; that he should not use a horse longer than a certain time without returning it to the stable for exchange; and that he should abstain from the use of intoxicating liquors and conform to prescribe rates and regulations, the agreement further providing that the company reserved the right to cancel the unexpired term of the lease for breach of conditions, the contract was one of bailment, and not one creating the relation of master and servant.

Police Officer Not Servant of City.—A police officer is not a servant of the city which appointed him, in any such sense as to take away his right of action against it for an injury sustained by reason of a defective highway. *Kimball v. Boston*, 83 Mass. (1 Allen), 417.

Assault on Trespasser—Watchman or Deputy Sheriff.—In *Texas, etc., R. Co. v. Parsons* (Tex.), 33 R. R. R. 376, 56 Am. & Eng. R. Cas., N. S., 376, 113 S. W. 914, an action against a railroad for assault on a trespasser, the evidence showed that the person who inflicted it was acting as the company's watchman at the time, and not as a deputy sheriff.

Special Police Officers.—In *Layne v. Chesapeake, etc., R. Co.* (W. Va.), 36 R. R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537, 67 S. E. 1103, it is held that a public police officer, specially employed by a common carrier to perform certain duties and services for it, is a servant of such carrier, while acting within the scope of such employment.

A. R. Y.

ST. LOUIS, I. M. & S. RY. CO. v. STATE.

(Supreme Court of Arkansas, April 10, 1911.)

[136 S. W. Rep. 938.]

Carriers—Supervision by Public Officers—Railroad Commission.—Const. Amend. 4, authorizing the creation of the Railroad Commission, is not a limitation of the authority that may be vested in it for effecting all the purposes for which it was designed.

Constitutional Law—State Constitution—Nature.—A state's Constitution is not an enabling act nor a grant of enumerated powers, and the Legislature may rightfully exercise the power of the people, subject to the limitations and restriction fixed by the Constitution of the United States and the state.

Constitutional Law—Constitutionality of Statutes—Presumptions.—A statute is presumed to be constitutional, and all doubts must be resolved in favor of its constitutionality; and in determining whether it is constitutional the court should look to see, not whether power has been expressly given to make it, but only to ascertain whether in express terms or by necessary implication it is forbidden.

Carriers—Supervision by Public Officers.*—A state may, by statute, required railroads to perform certain duties to the public and furnish proper and adequate facilities for the transportation of freight and passengers intrastate, and may clothe commissions and administrative bodies with such power.

Constitutional Law—Delegation of Legislative Powers.—The Legislature, having the right to require the construction by a railroad of a spur track, could, as it did by Act May 17, 1907 (Acts 1907, p. 821), delegate such power to the Railroad Commission.

Railroads—Supervision by Public Officers—Order of Railroad Commission—Review—Presumptions.†—An order of the Railroad Commission requiring the construction by railroad of a spur track, is presumed to be reasonable and just, until the contrary appears to the satisfaction of the court on its subjection to judicial review.

Jury—Right to Jury Trial—Denial of Right.—The question whether an order of the Railroad Commission, made under Act May 17, 1907 (Acts 1907, p. 821), requiring a railroad to construct a spur

*For the authorities in this series on the validity of state statutes providing for penalties to compel railroads to perform their duties to the public, etc., see foot-note of *Missouri Pac. Ry. Co. v. Nebraska* (U. S.), 36 R. R. R. 79, 59 Am. & Eng. R. Cas., N. S., 79; foot-note of *Downey v. Northern Pac. Ry. Co.* (N. Dak.), 35 R. R. R. 598, 58 Am. & Eng. R. Cas., N. S., 598; *Thweat v. Atlantic C. L. R. Co.* (S. C.), 35 R. R. R. 431, 58 Am. & Eng. R. Cas., N. S., 431.

†See foot-note of *Interstate Com. Commission v. Northern Pac. R. Co.* (U. S.), 36 R. R. R. 410, 59 Am. & Eng. R. Cas., N. S., 410; first foot-note of *St. Louis, etc., R. Co. v. State* (Okla.), 35 R. R. R. 430, 58 Am. & Eng. R. Cas., N. S., 430; fifth head-note of *State v. Florida E. C. Ry. Co.* (Fla.), 35 R. R. R. 423, 58 Am. & Eng. R. Cas., N. S., 423.

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track, was unreasonable and arbitrary was one of law for the court; and hence the refusal to submit the matter to a jury did not deprive the railroad of its constitutional right to a jury trial.

Railroads—Supervision by Public Officers—Railroad Commission—Order for Construction of Spur Track—Reasonableness.—In determining whether an order of the Railroad Commission requiring a railroad to construct a spur track was reasonable, the chief question was whether the improvement was necessary to meet the needs and promote the convenience of the public; and that the cost of its establishment and maintenance might greatly exceed the revenues from business done at the place because of such improvement, while a matter to be considered, did not necessarily control.

Railroads—Supervision by Public Officers—Railroad Commission—Additional Tracks—Reasonableness.—Evidence held insufficient to show that the Railroad Commission, in ordering a railroad to construct a spur track, acted reasonably and arbitrarily.

Commerce—Interstate Commerce—Interference With.†—An order of the Railroad Commission, requiring a railroad to lay a spur track at a certain point on the ground of public necessity, was not a regulation of or interference with interstate commerce, but a proper exercise of the police power of the state.

Constitutional Law—Due Process of Law—Regulation of Railroads.—Act May 17, 1907 (Acts 1907, p. 821), empowering the Railroad Commission to order railroads to lay spur tracks, and an order made thereunder did not deprive a railroad of its property without due process of law; the act providing that no order shall be made until all parties concerned are notified, and it appearing that due notice was in fact given, and that the railroad appeared and contested the matter.

Grand Jury—Indictment—Presumptions—Disclosures.—Under Kirby's Dig. §§ 2207, 2208, 2209, 2224, and 2226, imposing secrecy on grand jurors as to the manner in which they voted, etc., where an indictment was sufficiently specific, appearing on its face to be regular, and was returned into court in the presence of the grand jury and without objection by any of them, it would be presumed to have been duly found with the concurrence of the requisite number of the jury; and hence it was not error to refuse to allow a grand juror to testify as to the manner of finding or statement of fact on which the indictment was based.

Indictment and Information—Successive Indictments.—The refusal

†See foot-note of *Southern Ry. Co. v. King* (U. S.), 37 R. R. R. 45, 60 Am. & Eng. R. Cas., N. S., 45; *Detroit, etc., R. Co. v. State* (Ohio), 36 R. R. R. 625, 59 Am. & Eng. R. Cas., N. S., 625; last paragraph of last foot-note of *Davis v. Cleveland, etc., Ry. Co.* (U. S.), 36 R. R. R. 92, 59 Am. & Eng. R. Cas., N. S., 92; foot-note of *Missouri Pac. Ry. Co. v. Kansas* (U. S.), 35 R. R. R. 728, 58 Am. & Eng. R. Cas., N. S., 728; *Yazoo, etc., R. Co. v. Greenwood Grocery Co.* (Miss.), 35 R. R. R. 417, 58 Am. & Eng. R. Cas., N. S., 417.

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to squash an indictment against a railroad for failure to obey an order of the Railroad Commission, requiring the construction of a spur track, under Act May 17, 1907 (Acts 1907, p. 821), was not error, though there were 166 other indictments pending against the road because of the same failure; the statute expressly making each day's violation of such order a separate offense, and the indictments being each for a different day.

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

The St. Louis, Iron Mountain & Southern Railway Company was convicted of violating an order of the Railroad Commission, and appeals. Affirmed.

August 12, 1909, the grand jury of Marion county returned into court the following indictment against the appellant, to wit (omitting caption):

"The grand jury of Marion county, in the name and by the authority of the state of Arkansas, accuse the St. Louis, Iron Mountain & Southern Railway Company of the crime of failing, refusing, and neglecting to comply with a certain finding, decree, and mandate of the Railroad Commission of Arkansas, requiring it to construct and connect with its main line of railway a spur track on its right of way at a point opposite the mail crane erected at Comal, Arkansas, committed as follows, to wit: The said St. Louis, Iron Mountain & Southern Ry. Co., in the county of Marion and state of Arkansas, on the 2d day of September, 1908, unlawfully did fail, refuse, and neglect to comply with a certain finding, decree, and mandate of the Railroad Commission of Arkansas, requiring it to construct and connect with its main line of railway a spur track on its right of way at a point immediately opposite the mail crane erected at Comal Post Office, in the said county and state, of sufficient length to accommodate at least two cars, after the said Railroad Commission of Arkansas had, by its order No. 366 A, when said matter was properly and legally before said Railroad Commission of Arkansas, on the 6th day of May, 1908, ordered that said St. Louis, Iron Mountain & Southern Railway Company, on or before the 1st day of July, 1908, should construct and connect with its main line of railway a spur track on its right of way at a point immediately opposite the mail crane erected at Comal Post Office, Marion county, Arkansas, of sufficient length to accommodate at least two cars; contrary to the statute in such case made and provided, and against the peace and dignity of the state of Arkansas. [Signed] W. F. Reeves, Pros. Atty., 14th Judicial Circuit, Ark."

The grand jury of Marion county filed 166 other indictments against the appellant, charging a violation of said order of the

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Railroad Commission identical with the one above set out except that a different date is alleged in each as the date upon which the offense was committed. A motion was made to quash the indictment, because it was not found and presented as required by law, and because there were pending against the defendant other subsequent indictments for the same alleged offense, etc.

Testimony was introduced, and the court overruled the motion to quash. Appellant then filed a demurrer to the indictment, which was by the court overruled. Thereupon it filed its plea of not guilty and special pleas. These pleas set up: (1) Not guilty. (2) It denied that the Railroad Commission made the order referred to in the indictment. (3) The authority of the Railroad Commission to make such order. (4) That it was the duty of defendant to establish and maintain a spur at Comal Post Office at the time the order was made, and that the same was necessary to the best interests of the public. (5) It alleged that the order of the Railroad Commission was invalid as violating the interstate commerce clause of the Constitution, and (6) that said order was invalid because repugnant to section 1, fourteenth amendment to the Constitution of the United States. (7) That same was in violation of the laws of the United States regulating the carrying of mails under section 10, art. 1, of the Constitution. (8) That the enforcement of said order would deprive the appellant of its property without just compensation and without due process of law.

It alleged further: "That at the place mentioned in said indictment no railroad crosses the defendant's track, and no public road of any kind crosses the defendant's road at any place." There is no town, and the only improvements at said place consist of a mail crane erected by defendant for the accommodation of the post office of Comal, which is located nearby. That there is no town at the post office; the only improvements consisting of a small boxhouse, used as a general store, and dwelling house and post office. The surrounding country is sparsely settled, largely wild and uncultivated and rough; a timber country producing not more than one car load of cotton annually, which is hauled to the neighboring town of Yellville, where the producers are accustomed to purchasing their supplies. That at Comal Station, about 2,000 feet north of said post office and mail crane, there is a station where passengers and freight are received and discharged, and about five miles south of said post office and mail crane, on the line of the railroad, is the station. Yellville, where there is a depot building and side tracks, depot tracks, stock pen, cotton platform, and timber yards, and where a telegraph operator and passenger and freight agents are employed and stationed; and that said stations, Comal and Yellville, furnished to the inhabitants at and near Comal Post Office ample transportation facilities, and that to require the erec-

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tion and maintenance of a siding or spur track, where the defendant would be required to receive and deliver freight and issue bills of lading at Comal Post Office, would force said defendant to maintain three stations in a sparsely settled country, within a distance of about six miles; that to erect a spur track as prescribed and comply with the order would cost in the neighborhood of \$10,000, owing to the peculiar physical conditions and situation of the ground at that place. That because of the topography of the country it is impractical to provide said spur track, etc., except at a very great expense; that it would cost to maintain the same and carry out said pretended order \$100 per month, and that the receipts from freights at the place would not pay more than a very small proportion of such sum and expense attendant upon the maintaining of same as prescribed in the order, and that such spur track and facilities would have to be operated at a large monthly loss. That said post office is located at the foot of a heavy grade on defendant's line of railway, with a rise of 1 foot to 100 feet. There is a rising grade to the south for a long distance, more than 25,000 feet, all of which is a 1 per cent grade, and that said post office is located 4,000 feet south of another abrupt grade similar to that toward the south, and continuing at said grade for a distance of 15 miles to the northward," etc.

The appellant requested a jury to try both the general plea of not guilty and its special plea at the same time, but the court overruled the request, and held that the special pleas should be tried first, and not by a jury, to which ruling exceptions were saved. Appellant in its answer admitted that it had not built the spur in controversy and waived a jury to try its plea of not guilty, and agreed that its plea of not guilty should be tried by the court as a jury at the same time and upon the same evidence and admissions introduced in the special plea.

The testimony tended to show that when this White river branch of the railroad company was extended from Newport to Joplin, Mo., there was built about 5½ miles northwest of Yellville station a water tank and side track or spur, about 3,000 feet long, called Comal Station, which was used as a flag station and for taking water and for passing trains, loading and unloading freight, etc. Afterwards a post office was established about 2,500 feet southeast therefrom on its line, and named Comal Post Office, and a mail crane erected near the track. Between Comal siding and Comal Post Office a creek runs, crossed by a trestle, and between this creek and the post office there is a wide, dry creek or ravine which crosses under the railway track through a large stone culvert, a few yards west of the mail crane. This culvert is 18 feet high, and west of it and the mail crane is a long, deep narrow cut. East of the stone culvert and mail crane, toward Yellville, is a deep cut, and a re-

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verse or double curve, and about 1 per cent. upgrade eastward toward Yellville. The Comal Post Office is a short distance from the mail crane north of the track. After it was established, the people residing in the vicinity, more than 15, petitioned the Railroad Commission to require the railroad company to establish and maintain a depot with suitable sidings at or near the post office of Comal, and after giving notice of a hearing before it at which the company appeared, and holding a meeting upon the ground at Comal, where the company was represented by its superintendent, on May 6th the Commission entered the following order, requiring the construction of a spur track:

"Office of Railroad Commission of Arkansas. Order No. 355a. 2,089. Petition for depot and side track facilities at Comal Post Office, Marion county, Arkansas. Due and legal notice having been given, this matter coming on for hearing on this the 6th day of May, 1908, the same having been continued from a meeting held by the Commission, the entire Commission being present at Comal Post Office, Marion county, Arkansas, on the 14th day of April, 1908, at which meeting the petitioners were present and represented by Hon. J. W. Black, and the railroad company by its superintendent, John Daniels, and the matter coming on this day for decision of the Commission, after giving due consideration to the statements and arrangements of all parties and being well and sufficiently advised in the premises, we find that there is a public necessity for a side track or spur at a point immediately opposite the mail crane erected at Comal Post Office, Marion county, Arkansas. It is further ordered by the Commission that the St. Louis, Iron Mountain & S. R. Co. be, and the same is hereby, required to, on or before the 1st day of July, 1908, construct and connect with its main line of railway a spur track on its right of way at said point, of sufficient length to accommodate at least two cars, thus affording shipping facilities at said point. It is further ordered that the said railway company, upon the completion of said spur track, is to arrange to receive car load freight and issue bills of lading for the same, and to discharge less car load shipments at said point. It is further ordered that the prayer of the petitioners for a depot building at said point be and the same is hereby denied. By order of the Commission. W. E. Floyd, Secretary. Little Rock, Ark., May 6, 1908."

On the part of appellant, the testimony tended to show that to comply with the order it would be necessary to extend the stone culvert already mentioned 30 feet southward, and this whether the spur should be built from the mail crane westward or northward toward Pyatt, Mo., or whether it should be built eastward or southward toward Yellville. That the cost of the extension of the culvert alone would be \$2,500 to \$2,800. In

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either direction the spur might be built, it would cost \$5,000 or \$6,000. That to comply with the Commission's order further, it would be necessary to keep an agent there to issue bills of lading and receipt for freight deposited, which would cost about \$75 per month. That the freight and passenger traffic combined would not produce a revenue of more than \$50 per month. That the stopping of trains at the place would cause an additional expense and loss of time, and a spur track made would make the operation of their trains dangerous to both train crews and passengers. That the community is sparsely settled; there being less than 200 families in $2\frac{1}{2}$ miles radius of the mail crane, which takes in Comal Station and would extend within $2\frac{1}{2}$ miles of Yellville. It was also shown that at the time of the investigation by the Commission and the time of the making of the order by them, that the point on the railroad designated Comal Station had a passing track of 3,000 feet in length put in for the accommodation of passing trains; that there were no buildings of any kind at the point, and no shelter for passengers nor receptacle for freight; that there were cedar posts piled there for shipment, and that cars were furnished there on the passing track for that purpose, but there was no public road leading thereto, and to reach this siding required the crossing of private lands; that it is located in the cotton farm. The principal product delivered for shipment there was cedar posts, a larger portion of which were hauled from the vicinity of the mail crane. There were no facilities afforded for loading this cedar at this point, nor sufficient room on the company's premises for storing it. Shippers were required to use private lands for such purposes, and after it was piled there to carry it on their shoulders and put it in the car. One witness, describing it, said: "At the switch at Comal there is not much room outside of right of way lines to pile timber for shipment. It is crammed up, and a bad place to put timber. Besides, on the north side of creek (mail crane side) they have no road leading out from Comal spur."

Treating the railroad running through the points designated as the mail crane and Comal Siding as running north and south and also east and west, north and west towards Pyatt, and east and south towards Yellville, the passing track at Comal Siding was on the east side of the main line, and to reach this said track from the west side would necessitate the crossing of the main line, and at this point of crossing the track curved in each direction around a bluff or bank, which obstructs the view of approaching trains. It could not be reached for loading and receiving freight without passing on private lands. To the left of said siding towards Pyatt is a hillside, and to the right is low bottom, which in time of high water overflows, leaving a deposit of quicksand and gravel. On this low bottom, shippers

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are required, on account of lack of room and no other facilities being provided, to stack their cedar posts for shipment, and there was no agent or other person kept there for receiving or delivering freight, and no one to whom application for cars could be made. The trains did not stop, unless flagged. The practice or custom on this line of railroad is to construct a spur for receiving and discharging freight about every five miles, and from Yellville to the east or south to Pyatt to the west and north is a distance of 10 miles, without any spur for receiving or discharging freight, except this passing track at Comal Siding. The distance by the railroad track from the east or south of the passing track to the mail crane, is from 2,000 feet to three-quarters of a mile. Between the two points flows Crooked creek, on the mail crane side of which is a high, steep bluff, ranging from 40 feet to 100 feet high, and extending over a distance of from 1 to $1\frac{1}{2}$ miles, both to the north and south of the mail crane. In point of accessibility in hauling freight to and from the station by the particular routes that existed at the time this order was made, Comal Station was from one to two miles from the mail crane. There were two neighborhood roads leading thereto, which came together at a point about 150 yards from the mail crane. The road leading down the creek and across the defendant's railway just north and west of the mail crane had existed for many years, and had been continuously used by the public as a road; but that portion extending to Comal Siding was not put there until after the railroad was built. Both of these roads cross the Crooked creek, which at certain seasons of the year overflows and renders them impassable. Each of these roads require that those who haul over them pull steep hills and descend steep grades, and pass over the private lands of other parties. At and around the mail crane and post office is a settlement, a church, a store building, a voting precinct, and schoolhouse. It is thickly settled and within a radius of $2\frac{1}{2}$ miles is a vast supply of cedar timber suitable for commercial purposes, of the same character as was at that time and has been since shipped from Comal Siding. There was also a vast supply of other timber, some of which was being shipped out for firewood. In close proximity to this point is the best farming portion of that country, and on these farms cotton is grown, some of which is hauled to the Halliday gin in that neighborhood, which is nearer the mail crane than Comal Siding, and there were no facilities for storing cotton for shipment at said siding. Some of those living in the neighborhood of the mail crane were engaged in buying, raising, and shipping stock at the time, but no cattle pens or other facilities were provided for receiving such shipments.

All the evidence tends to show that by far the larger part of the freight tendered for shipment at the time this order was made

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by the Commission came from the Comal mail crane side of the creek and settlement. The evidence was practically undisputed that the spur track at the mail crane would be much more convenient and accessible for all persons residing on that side of the creek, and no single shipment was shown by any one residing on the Comal Siding side of the creek. Up to that time suitable facilities for shipping the products from in and around the place had not been provided at any point nearer than Yellville, about five miles away.

As to the cost of construction, W. H. Elliott, witness for the state, a civil engineer, stated that Comal mail crane is located between two cuts, and a portion of the roadbed there consists of a stone culvert over dry creek and dump made from stone and debris taken from these cuts. The distance from the mail crane and bluff cut towards Comal Siding is between 350 and 400 feet. The distance of the crane at this particular point, from the left rail of the track to the stone cap on the outside of the culvert, is 11 feet, and beyond the dump extends from the left rail to the left to a distance and width from 26 to 41½ feet. Starting the spur with a connection opposite the mail crane and running it towards Pyatt, no extension of the culvert would be necessary, and after the track was laid on the standard of defendant there would still remain between the left switch rail and the stone cap a space of about six feet that would allow for the passage of the train crew while switching. This proposed construction and the space left after same is made was demonstrated by an exhibit, evidence which was not contradicted by the defendant, and testimony was from actual measurements taken. This dump is about two feet lower than the ballast or roadbed upon which rests the main line, and upon the switch there would have to be laid a roadbed on which to lay the switch track. To put in the switch after the grading was done would cost \$400, according to the estimate of Mr. Hanna, a division engineer for the road and a witness for the defendant. Elliott testified that the entire cost of construction of a switch at this point and providing a driveway for wagons and teams for loading and unloading would cost not to exceed \$710. By this method of construction, there would be no necessity for widening the cuts or extending the culverts, and estimate was based on actual measurements taken upon the ground.

All the testimony of the defendant or appellant, was predicated upon the theory that the culvert must be extended 30 feet and excavations made in the bluff or cuts, but none of their experts contradicted or denied the practicability of building the spur, or the cost thereof, as shown on the plat made by Mr. Elliott, which provides a passway for wagons down the side of the dump and under the culvert. The evidence of appellant provides for the road over the culvert, and its experts admitted there was

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room at present between the main line and the culvert to lay a spur track without an extension of the culvert, but claimed room would have to be afforded for the passage of teams, wagons, and train crew, and fixing the distance between the left rail and left stone cap of the culvert at 67 feet, and width of dump rail to the edge thereof from 15 to 21 feet; each way actual measurement was shown to be from 21 to 21½ feet.

As to construction of switch towards Yellville in south and east direction, Mr. Elliott, the only witness who made actual measurements, testified that it would cost \$1,100 to construct a spur track of the required size. Appellant's witnesses fixed the cost of the extension of 30 feet culvert at from \$2,500 to \$2,800, and the total cost of spur and extension from \$5,000 to \$6,000. On the profile map introduced, a line representing the grade of the road shows from the point designated as Comal Station that the track is practically level to a point 39 feet beyond the mail crane; or, to be accurate, the grade begins, according to the map, at a point just 750 feet west or north of the west or north end of the trestle known as the George Creek trestle. The blueprint shows the north or west end of this trestle to be about 4,450 feet from the mail crane. It further shows that it is downgrade from the mail crane to where the heavy grade begins. The alignment of the track was shown to be perfectly straight for a distance of something like 1,500 feet from the mail crane east and south towards Yellville, and about 2,800 feet towards Comal Siding. The mail crane is about six feet from the side track, and is in plain view from Crooked Creek bridge, 900 feet away. The photograph views of the situation indicate that trainmen would have an unobstructed view of the roadbed for a sufficient distance on each side to observe a switch stand.

W. E. Hemingway, E. B. Kinsworthy, Jas. H. Stevenson, Horton & South, and S. D. Campbell, for appellant.

Hal L. Norwood, Atty. Gen., Wm. H. Rector, Asst. Atty. Gen., and Gus Seatwell, for the State.

KIRBY, J. (after stating the facts as above). The power of the Railroad Commission to make the order violated, and for a violation of which appellant was indicted, is challenged because the Legislature could not rightfully authorize the Commission to make it, and because the making of such order was an unreasonable and arbitrary exercise of it, if it had such power.

[1] Amendment No. 4 to the Constitution authorizes the creation of the Railroad Commission, and is not a limitation of the authority that may be vested in it for effecting all the purposes for which it was designed and established, and if it could be regarded otherwise the whole unrestricted power of the people necessary to the proper regulation of railroads may well be exercised by it under laws to correct abuses and prevent unjust dis-

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criminations and excessive charges by railroads, as authorized thereunder.

[2] A state's Constitution is not an enabling act nor a grant of enumerated powers, and the Legislature may rightfully exercise the power of the people, subject to the limitations and restriction fixed by the Constitution of the United States and the state. *Straub v. Gordon*, 27 Ark. 629; *Vance v. Austell*, 45 Ark. 400; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590; *State v. Martin*, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153; *Cox v. State*, 72 Ark. 97, 78 S. W. 756, 105 Am. St. Rep. 17.

[3] A statute is presumed to be constitutional and all doubts must be resolved in favor of its constitutionality, and in determining whether it is constitutional the court should look to see, not whether power has been expressly given to make it, but only to ascertain whether in express terms or by necessary implication it is forbidden. *Patterson v. Temple*, 27 Ark. 202; *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *Leep v. Railway*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *State v. Martin*, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153.

[4] It is no longer questioned that a state Legislature may require by statute railroads to perform certain duties to the public and furnish proper and adequate facilities for the transportation of freight and passengers intrastate, and that it may clothe commissions and administrative bodies with such power.

In *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 275, 30 Sup. Ct. 334 (54 L. Ed. 472), the court said: "The court, in *Atlantic Coast Line Co. v. N. Car. Corporation Commission*, 206 U. S. 7, 19 [27 Sup. Ct. 585, 591 (51 L. Ed. 933)], reiterating the doctrine propounded in preceding cases, said: 'The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation which may be necessary, either directly by legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine.'"

Also in the same case, restating a principle previously often announced, it was held (page 20, 206 U. S., page 592, 27 Sup. Ct. [51 L. Ed. 933]): "That railroad property was susceptible of private ownership, and that rights in and to such property rested in constitutional guaranties by which all private property was protected. Pointing out that there was no incompatibility between the two, the truism was reannounced that the right of private ownership was not abridged by subjecting the enjoyment of that right to the power of reasonable regulation, and that such governmental power could not in truth be said to be curtailed because it could not be exerted arbitrarily and unreason-

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ably without impinging on the enduring guaranties by which the Constitution protected property rights."

[5] The Legislature had the right to require the construction of this spur track, and having it could delegate the power to the Railroad Commission, as it has done by said act of 1907. See Act No. 338, Acts 1907, approved May 17, 1907. If it had made the requirement directly by statute, instead of conferring the power upon the Railroad Commission to make it, its action would have been subject to judicial review, only as being so arbitrary and unreasonable as to cause it to be void for want of power, as this court held in *La. & Ark. Railway Co. v. State*, 85 Ark. 12, 106 S. W. 960, and *St. Louis S. W. Ry. Co. v. State*, 134 S. W. 970.

[6] The order of the Railroad Commission made under the authority delegated to it is subject to like review for the same cause, and, being the tribunal provided by law for passing upon the question under the prescribed procedure as to the petition, notice, hearing, inspection of the locality affected, and granting of the relief prayed for, by requiring the construction of the spur track in question, its order duly made is presumed to be reasonable and just, and a proper exercise of the power granted to it, unless and until the contrary is made to appear to the satisfaction of the court upon its subjection to such judicial review.

[7] Appellant contends, however, that it was deprived of a constitutional right by the court refusing to submit the matter to trial by jury upon its demand. No provision is made in the laws creating the Railroad Commission and prescribing its powers and duties, nor in the act of 1907, under which the order for the violation of which appellant was indicted was made by it, expressly or by implication for the trial or review of its acts and orders by a jury on questions of fact.

In *Kirkland v. State*, 72 Ark. 177, 78 S. W. 772 (65 L. R. A. 76, 105 Am. St. Rep. 25), the court said: "It is true that the Constitution provides that 'the right of trial by jury shall remain inviolate' (article 2, § 7); and that no person shall 'be deprived of life, liberty or property without due process of law (article 2, § 8); but it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case." *Govan v. Jackson*, 32 Ark. 553; *Williams v. Citizens*, 40 Ark. 290. The question as to whether or not said order was unreasonable and arbitrary was one of law for the court; it never having been intended that a jury should pass upon, as a question of fact, whether the exercise of power by the Legislature or by the Railroad Commission under legislative enactment was unreasonable and arbitrary. *L. & A. Railroad v. State*, 85 Ark. 12, 106 S. W. 960; *St. L., S. W. Ry. Co. v. State*, 134 S. W. 970.

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The court committed no error in refusing its demand for a jury to try the question under its said plea, and it waived this right to a jury and consented to a trial by the court upon the question of its violation of the order made by the Railroad Commission.

The Railroad Commission, in the proper exercise of the powers conferred upon it by the act of 1907, had primarily the right to determine whether the public necessity and convenience required the establishment of the spur track for the loading and unloading of freight at Comal Post Office, and having determined by an order, duly made, in accordance with said act its determination will not be disturbed, unless it is clearly shown that such requirement is unreasonable and arbitrary.

[8] In the determination of the reasonableness of the requirement, the chief question to be considered is whether such improvement as directed made is necessary to meet the needs and promote the convenience of the public. The fact that its establishment and maintenance might greatly exceed the revenues that would probably be derived from the business done at such place because of the improvement is a matter to be considered also, but does not necessarily control.

[9] The testimony shows that at and around the place where this spur track was ordered constructed is a settlement, a church, a store, post office building, a voting precinct, schoolhouse; that it is thickly settled, and within a radius of $2\frac{1}{2}$ miles is a vast supply of cedar timber suitable for commercial purposes, and other timber which was being shipped out for firewood. In close proximity to this point are some of the best farming lands of that county, and that cotton is grown upon the farms, some of which is hauled to the gin in that neighborhood, which is nearer the mail crane than the Comal Siding beyond the Creek, where there were no facilities for storing cotton for shipment. That people in the neighborhood were engaged in buying and raising and shipping stock at the time the improvement was ordered, and that no stock pens or other facilities were provided at the Comal Station for receiving shipments of that kind—virtually that there were no adequate shipping facilities provided nearer than Yellville, five miles away. The evidence tended to show that it was practicable to construct the spur track, as directed, towards the north for \$710, and towards the south for \$1,100, and that the probable revenue that would be derived would amount to \$50 per month.

The evidence adduced by the Railroad Company tended to show that it would require a much greater amount to construct the spur, whether it was extended to the north or to the south, and that it would probably cost \$75 a month to comply with the order in preparing to receive freight for shipment at the spur and issue bills of lading. But the order itself does not require that

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an agent shall be maintained at the spur where no depot nor station house existed, and where none was expected to be constructed, but only seems to indicate that the same practice as to receiving shipments of freight and issuing bills of lading should obtain there as at other spurs where no agent was maintained, and that it would be put to no additional expense, of course, on that account. Under this proof we are not able to say that the Railroad Commission in making said order acted without reason, and arbitrarily, in determining that there was a public necessity for the establishment and maintenance of this spur track as directed by it.

[10] Neither do we think that such order and requirement is subject to the objection that it was in effect a regulation of or interference with interstate commerce, and on that account void. Such order requiring the construction of said spur at Comal Post Office, where the public necessity warranted its being made was but the proper exercise of the police power of the state by the commission to whom the authority was delegated, and was not an attempt to regulate, lay burdens upon, or interfere with, interstate commerce, which it could only effect incidentally, if at all. *St. L. S. W. R. Co. v. State*, 134 S. W. 970; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Mobile County v. Kimble*, 102 U. S. 691, 26 L. Ed. 238; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. Ed. 1064; *M., K. & T. Railway Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

[11] It is contended that said act and order of the Commission thereunder deprived appellant of its property without due process of law. This objection is not tenable, however, for the act provides that "no order shall be made until all parties concerned shall receive ten days notice of the proposed action by the Railroad Commission." In this case the notice was shown to have been given, the railroad company appeared before the Commission in opposition to the petition for the spur track, and made no complaint because of a lack of or insufficient notice; its superintendent was also present upon the ground at the site where the proposed improvement was to be made, and at both places had the right to and did urge all facts and objections that would tend to show the cost and difficulty of the construction of the improvement asked for, and the want of any public necessity therefore. After the hearing and decision, it was properly notified of such order by a copy served in accordance with the provisions of the act. A legislative determination of this question would not be open to the objection that it was a deprivation of property without due process of law. How much less reason is there for urging such objection to the action of the Railroad Commission, the tribunal provided by law for the ascertainment

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of the necessity for such improvement after an investigation is made in which it had notice, and in which it appeared and took part. Having appeared in such tribunal and contested the matter throughout, it has no right to complain that the order of the Commission deprives it of property without due process of law.

In *Louisville & N. W. Ry. Co. v. Schmidt*, 177 U. S. 230, 236; 20 Sup. Ct. 620, 622 (44 L. Ed. 747), the court said: "It is no longer open to contention that the due process clause of the fourteenth amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate the practice therein. All of its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend."

[12] The indictment was sufficiently specific, and having been properly returned into court by the grand jury, and showing upon its face, and by such return and filing and docketing in court in their presence, and without objection by any of them, to be in all respects regular and in accordance with law, it will be presumed that it was duly found with the concurrence of the requisite number of the grand jury, and the court committed no error in refusing to allow a member of the grand jury to testify as to the manner of finding or statement of fact upon which the indictment was based, and by the grand jury ordered to be drafted. *Nash v. State*, 73 Ark. 405, 84 S. W. 497; sections 2207, 2208, 2209, 2224, 2226, Kirby's Digest; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420.

[13] Neither was error committed in overruling the motion to quash the indictment, because there were 166 other indictments pending against appellant because of the same failure and refusal to construct the spur in accordance with the direction and requirement of said order of the Railroad Commission. The statute expressly makes each day's violation of such order by the railroad company failing and refusing to comply with it a separate offense, and punishable as such, and these indictments, although they were each in fact a charge of an offense for a like violation of the same order, each was for a different day, and was for a separate offense under said statute. The penalties provided by this statute were intended to compel a compliance with, and obedience to, the reasonable orders, regulations, decrees, and mandates of the Railroad Commission, duly made, after notice and a hearing, and they are not burdensome and excessive, nor greater in any way than reasonably necessary to effect such purpose.

Finding no error in the judgment, it is affirmed.

CHASE *v.* NEW YORK CENT. R. CO. (*two cases*). HANCOCK *v.*
SAME. PAGE *v.* SAME (*two cases*).

(Supreme Judicial Court of Massachusetts, Worcester, March 1, 1911.)

[94 N. E. Rep. 377.]

Railroads—Crossing Accident—Question for Jury.—Evidence of negligence of a railroad company in a collision with an automobile at a highway crossing held insufficient to go to the jury.

Railroads—Travelers Approaching Crossing—Care Required.—The driver of a horse-drawn vehicle must look and listen in a reasonable way to secure his safety, if possible, when approaching a crossing; but the driver of an automobile, who is better able to settle an uncertainty on the side of safety, is rigidly held to reasonable care and precaution.

Evidence—Competency—Negative Evidence.*—When a witness says he was giving attention to the place and the possible dangers, his failure to hear a bell or whistle at a railroad crossing is competent evidence that they were not sounded.

Railroads—Crossing Accident—Evidence of Contributory Negligence.—Evidence held not to show that a chauffeur was in the exercise of due care at the time of a collision, but, on the contrary, to show that the accident was caused by his carelessness.

Evidence—Opinion Evidence—Title to Personality.—The statement of a witness that an automobile belonged to a certain company at the time of an accident was only his opinion, and is incompetent to prove title, when everything on which it depends is established by evidence from records and undisputed facts.

Sales—Time of Passing Title—Evidence.—Evidence held to show that title to an automobile passed on the date when the buyer accepted a bill of sale of it and other property, and complied with conditions on which the bill was to take effect.

Highways—Registration of Automobile—How Long Effective.—Registration of an automobile, which by St. 1903, c. 473, § 2, is only effective till sold, cannot, after its sale, become effective, unless it again comes into the seller's ownership or control.

Railroads—Crossing Accident—Persons in Unregistered Automobile.—Though St. 1906, c. 463, pt. 2, § 245, relating to liability of railroads for injuries to persons through neglect to give signals at crossings, and which was originally enacted as St. 1871, c. 352, under the title "An act for the better protection of travelers at railroad crossings," does not in its body limit the liability to persons using a way as travelers, it must, in view of its general purpose and title, be construed as not applicable to others; and hence it is not

*See foot-note of *Anspach v. Philadelphia, etc., Ry. Co.* (Pa.), 35 R. R. R. 91, 58 Am. & Eng. R. Cas., N. S., 91; foot-note of *Louisville & N. R. Co. v. O'Nan* (Ky.), 34 R. R. R. 528, 57 Am. & Eng. R. Cas., N. S., 528.

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available to persons so injured while riding in an unregistered automobile, as such persons do not have the rights of travelers.

Railroads—Crossing Accident—Persons in Unregistered Automobile.—Persons who rode in an unregistered automobile, when injured in collision with a train at a crossing, acted in violation of law, and their unlawful act contributed to their injury, within the express provisions of St. 1906, c. 463, pt. 2, § 245, precluding recovery under such circumstances.

Report from Superior Court, Worcester County; George A. Sanderson, Judge.

Separate actions by Louis S. Chase, Sumner H. Hancock, Irving H. Page, and Alice J. Page against the New York Central Railroad Company. There were verdicts for plaintiffs, and pursuant to stipulation they are set aside, and the cases reported to the Supreme Judicial Court. Judgments for defendant.

C. W. Bartlett, Webster Thayer, and A. T. Smith, for plaintiffs.

R. A. Stewart, H. J. Hart, L. R. Chamberlin, and E. S. Kochersperger, for defendant.

KNOWLTON, C. J. These are five actions to recover damages caused by a collision of an automobile in which the plaintiffs were riding, with a locomotive engine and a combination passenger and baggage car of the defendant, at a crossing of the highway by the railroad in East Brookfield, on August 21, 1906. The second of the actions is for the death of the plaintiff's intestate, caused by this accident. Each of the others has counts at common law, as well as a count under St. 1906, c. 463, pt. 2, § 245, founded upon the alleged neglect of the defendant to give the signals required by law at railroad crossings. A great variety of questions arose at the trial, some of which it will not be necessary to decide. It was arranged with the judge, by agreement of counsel, that the five cases, with another brought by the Stevens-Duryea Company to recover damages for injury to the automobile, should be submitted to the jury, and that if verdicts for the defendant were returned in any of the cases the findings of the jury should be final. If they should find for the plaintiff in any of the cases, the verdicts were to be set aside, and the cases reported to this court upon the question whether the judge was justified as a matter of law in submitting them to the jury. If he was not, judgments were to be entered for the defendant. If the cases were rightly submitted, judgments were to be entered for the plaintiffs upon the verdicts, subject to certain stipulations as to possible motions for a new trial on the ground of excessive damages, which are not now material.

The question before us is whether, upon such of the evidence

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as is material and competent, the cases could properly be submitted to the jury. Ordinarily the first inquiry upon such a report is whether there was evidence of negligence of the defendant or its servants. The accident happened at a crossing of the branch of the defendant's railroad that runs four miles from East Brookfield to North Brookfield. The highway at that point runs nearly east and west and the railroad nearly north and south, although the two roads at the crossing are not exactly at right angles, the larger angle between them being at the right of the plaintiffs as they approached the crossing, which was the direction from which the train came, and the smaller angle being at their left. The plaintiffs were going westward on their way from Boston to Chicopee Falls. The accident happened at about 12 o'clock, on a bright day in August. The plaintiffs were riding in an automobile of 50 horse power, weighing about 3,750 pounds when empty, designed to carry seven passengers, and capable of going at a speed of 60 miles an hour when carrying five persons. Hancock, who was running the automobile, was a chauffeur of large experience, who has driven automobiles in different races, and who drove one of this kind a mile, in one race, at a speed of 70 miles an hour. He was familiar with this crossing, having driven over it many times in each direction. The plaintiffs Irving H. Page and Alice J. Page had been over it a considerable number of times, and had observed it in passing. Neither the other plaintiff nor his wife, the intestate, had ever passed over it.

The country for a considerable distance on the highway and along the railroad is nearly level. The ordinary sign on the highway to warn travelers of the danger of the crossing was maintained, and the plank on the crossing cattle guards at the sides, and other objects, showed plainly that this was a railroad crossing. The highway was a dirt road, hard, in good condition and descending at a very slight grade in the approach to the crossing from the east. From most points on the way, for a considerable distance east of the crossing, a train approaching from the north could be plainly seen, although there were points where the view would be obstructed by houses, trees or shrubbery. An engineer, who presented a plan made from a survey, testified to the distances from the crossing up the track, northward, that a person standing in the middle of the railroad could be seen from points in the middle of the highway at different distances from the middle of the crossing. From a point 10 feet east of the crossing one can see up the track 833 feet; from a point 20 feet east, 713 feet; from a point 30 feet east, 613 feet; from a point 40 feet east 433 feet, and so on, with gradually diminishing distances from points at intervals of 10 feet of additional distance eastward, until, from a point 175 feet east, one can see up the track only 118 feet. The crossing

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is in a country town, but there is quite a large amount of travel over it. The trains over this branch road are very few.

Plainly the corporation itself could not be found to be negligent in maintaining this crossing at grade, on a country road, with the sign and other appointments described in the testimony. It was within the authority of the statute. There had been no requirement by the railroad commissioners under the provisions of Rev. Laws, c. 111, § 192, that gates, or a flagman, or an electric signal, should be maintained there, and the conditions shown in the evidence were not such as would warrant the jury in finding negligence on the part of the corporation in failing to provide such appointments voluntarily. *Hubbard v. Boston & Albany R. R.*, 162 Mass. 133-135, 38 N. E. 366; *Com. v. Boston & Worcester R. R.*, 101 Mass. 201.

The only negligence on the part of the defendant's servants for which there is a possible ground of contention was in running the train too rapidly, or in failing to give the statutory signals required at crossings. As to the first, it appeared that there are no stopping places between North Brookfield and East Brookfield. The running time is 10 minutes for the 4 miles. There were numerous witnesses who testified as to the speed of the train at the time of the accident, no one of whom estimated it at more than 25 miles an hour. The weight of the evidence tended to show that the train was running at from 20 to 25 miles an hour. The only evidence upon which the plaintiffs rely, as tending to show that it was going faster than this, is the testimony of the engineer, who was asked in cross-examination as to the rate at which he was running in different parts of his course. He gave estimates of miles per hour, from which the plaintiffs' counsel compute the time spent in going his first mile as 2 minutes and 30 seconds, the time for the second mile as 2 minutes and 24 seconds, and the time for the third mile as 2 minutes and 25 seconds, making an aggregate for the 3 miles of 7 minutes and 19 seconds. He testified that the distance from North Brookfield to the crossing is $3\frac{1}{2}$ miles, and that the train left North Brookfield at 7 minutes before 12 o'clock, and he gave the time of the accident as 1 minute past 12 o'clock, as nearly as he could judge. Upon these estimates and computations there were but 41 seconds in which to run the last half mile before the accident, from which it is contended that the train was then running at the rate of 44 miles an hour. Another witness testified that he heard the whistle and the crash of the accident, and he judged that there was an interval of 20 seconds between them. A speed of 80 rods in 20 seconds would be at the rate of 45 miles an hour. Treating these figures as exactly correct, which were given only as general estimates both of time and speed, and subtracting the aggregate of estimated time for each of the first three miles from another time

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thought to be about the time of the accident and a number of seconds is obtained to represent the time of running the last part of the course, which would indicate a speed greater than 25 miles an hour. It is plain that running at the rate of 25 miles an hour is not evidence of negligence. It is also plain, that if, such a computation in seconds, founded only upon certain estimates made from judgment and memory, long afterwards, has any tendency to show that the train was then running faster than 25 miles an hour, it is hardly more than a scintilla of evidence to set against the other testimony in the case.

The testimony relied on to sustain the plaintiffs' contention that the defendant's servants were negligent in not ringing the bell and blowing the whistle is not more convincing. The witnesses who were in the automobile testified that they heard no bell or whistle and saw and heard nothing of the approaching train until it was right upon them. Twenty-four witnesses testified positively that they heard the whistle blown in the usual way as the train approached the crossing. Ten witnesses testified with equal positiveness to hearing the ringing of the bell. Several of these testified that it rang all the way from the signal post to the crossing and several that they could not tell whether it was ringing all the way from the whistling post or only a part of the way. Not one of the witnesses who testified on this subject, other than the persons in the automobile, said anything which under the decisions could be received as evidence that the bell did not ring. *Menard v. Boston & Maine R. R.*, 150 Mass. 386, 387, 23 N. E. 214; *Slattery v. N. Y., N. H. & H. R. R.*, 203 Mass. 453-457, 89 N. E. 622, 133 Am. St. Rep. 311, and cases cited. One of them testified: "I do not remember about the bell. I used to hear the bell and the whistle. I never minded them. I never minded the bell. I used to hear the whistle." Another said: "I heard the whistle. It was the usual sound of the whistle given by the train. I do not know as I can remember about the bell." Others testified in a similar way. No one of those who failed to hear the bell was shown to be in such a position, or to be giving such attention, that his failure to notice it was any evidence that it did not ring.

It would seem as if the same could be said of the four persons who were in the tonneau of the automobile. According to the testimony, they were engaged in conversation, telling stories and the like, and no one of them was giving any attention to the fact that they were approaching a crossing, or to the possibility of hearing a signal from a locomotive engine.

But, according to the testimony of Hancock, this cannot be said of him. He says he was giving attention to the place and the possible dangers. Under the decisions, his failure to hear the bell or whistle would be competent evidence tending to show that they were not sounded. Whether, in a case where the bur-

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den of proof was on him to establish the proposition that the whistle was not blown, a verdict in his favor could be permitted to stand against the testimony of 24 credible witnesses who said that they heard it, or whether it would be the duty of the judge to set aside such a verdict toties quoties, upon application, is a question that we need not decide. Upon this point, too, there is little, if any, more than a mere scintilla of evidence that there was neglect to give the statutory signals.

Upon such counts submitted to the jury as required proof that Hancock, in running the machine, was in the exercise of due care, we think it plain that there was no evidence for their consideration. Upon his testimony at this trial, he was running this car at the rate of from 12 to 15 miles an hour until he was very close to the track, when he reduced his speed to 8 miles an hour. There was other testimony that he was running very fast. At the inquest which was held soon after the accident, he testified that he was going about 15 miles an hour approaching the crossing, and slowed up to about 12 miles an hour before the accident. A witness who talked with him on the day of the accident, inquiring how it happened, testified: "I asked him if he was going so fast he could not stop, and he said, 'I was not running that car over 20 miles an hour.'" According to his testimony and that of the other witnesses in the car, neither he nor any of the others had any knowledge they were within about 15 feet of the track. He was perfectly familiar with the crossing and supposed that a train might come from either direction at any moment.

The rules of law applicable to the driver of a horsedrawn vehicle approaching a railroad crossing have been laid down in many cases. He must look and listen in a reasonable way, so as, if possible, to secure his safety. The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses. As was said in *Hubbard v. Boston & Albany R. R.*, 162 Mass. 132-136, 38 N. E. 366, 368: "There are very few horses that can safely be stopped within 15 or 20 feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look, so near the track as to expose him to great danger from the fright of his horse, if an approaching train should be near." The driver of an automobile is in no such danger. If his machine is a good one, it can be controlled easily and perfectly and there is no danger from it if he stops to look and listen within six feet of the track. The difference between automobiles and vehicles drawn by horses, in the application of the rule has been recognized by the courts. In *New York Central & Hudson*

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River R. R. v. Maidment, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794, the court said: "He cannot drive close to the track, or stop there, without risk of his horse frightening, shying or overturning his vehicle. * * * These precautions the automobile driver can take carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety with less inconvenience, no danger, and more surely, than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care and not chance their protection, the possibilities of automobile crossing accidents will be minimized." To the same purport is *Brommer v. Pennsylvania Railroad*, 179 Fed. 577, 103 C. C. A. 135. See, also, *Spencer v. New York Central & Hudson River R. R.*, 123 App. Div. 789, 108 N. Y. Supp. 245, affirmed in 197 N. Y. 507, 90 N. E. 1166. With the statement of the law in the paragraph above quoted we entirely agree. With proper care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town. In this case, considering that part of the testimony which is most favorable to the plaintiffs, there is no evidence that Hancock was in the exercise of due care; but, on the contrary, the accident seems to have been caused by his great carelessness.

We will not consider whether there was evidence that the other plaintiffs, or any of them, were personally in the exercise of care, or whether any or all of them were in such relations to Hancock as to be affected by his negligence, within the rules stated in *Shultz v. Old Colony Street Railway Company*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, and later cases.

There are undisputed facts which, in our opinion, are decisive of the cases. The automobile, up to the time of its completion or until about that time, belonged to the J. Stevens Arms & Tool Company, which was a manufacturer of firearms, machines and other tools, and also of automobiles. The business of manufacturing and selling automobiles was conducted in a separate department called the automobile department. The pattern of automobile manufactured was called the Stevens-Duryea automobile, and this department of the business, during the last part of the time of carrying it on by this corporation, was sometimes called the Stevens-Duryea Company. Early in the year 1906 the officers and members of the J. Stevens Arms & Tool

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Company formed a plan to organize a corporation, to be called the Stevens-Duryea Company, to take over the property and business of the automobile department of the J. Stevens Arms & Tool Company. On May 18, 1906, a majority of the directors of this corporation applied to the Secretary of the Commonwealth for a certificate of incorporation for a new company to be known as the Stevens-Duryea Company, to have a capital stock of \$300,000, made up of 3,000 shares, of a par value of \$100 each. Its authorized business was to be the manufacture and sale of automobiles, with a right to do other things which we need not mention. On May 18, 1906, a certificate of incorporation was duly issued in accordance with the application, containing a provision that the 3,000 shares of capital stock should be paid for, to the amount of 1,000 shares in personal property and machinery, and to the amount of 2,000 shares in merchandise. The J. Stevens Arms & Tool Company had a license numbered 064, issued under the authority of St. 1903, c. 473, § 2, as a generally distinguishing number or mark, which operated as a registration of automobiles and motor cycles owned or controlled by it, until sold or let for hire, or lent for a period of more than five successive days. The automobile in which the plaintiffs were riding bore the number 064, and was being used under this general registration number of the J. Stevens Arms & Tool Company at the time of the accident. Its registration, by the terms of the statute, ceased when it was sold. The defendant contended at the trial that it was sold to the Stevens-Duryea Company before the accident, and was therefore unregistered, and was being used in violation of St. 1903, c. 473, § 6.

On July 6, 1906, a meeting of the directors of the Stevens-Duryea Company was held, at which the following vote was passed: "Voted, that the property offered by the J. Stevens Arms & Tool Company and J. Frank Duryea, in exchange for 3,000 shares of common stock of this company, appears to be reasonably worth the value of said stock, and to be necessary for the purposes of the company. The same is hereby accepted in full payment for said shares of stock, and the proper officers of this company are hereby authorized and directed to receive duly executed bills of assignment, etc., of said property, and to issue in exchange therefor 3,000 shares of the capital stock of this company to said J. Stevens Arms & Tool Company and J. Frank Duryea, in the proportion of two-thirds to said company and one-third to said Duryea, or to persons designated by them." On August 17, 1906, a meeting of the directors of the J. Stevens Arms & Tool Company was held, at which the bill of sale was read, a copy of which is included in the record of the meeting, running from this corporation to the Stevens-Duryea Company, purporting to sell and convey to the latter corporation, for a "consideration of one dollar and the other considerations

hereinafter expressed," the receipt of which is acknowledged, all the property belonging to its automobile business, all of which is more fully described in a schedule annexed. It is admitted that the automobile used at the time of the accident was a part of this property. In the bill of sale were these provisions:

"And whereas, for sometime past, and prior to the organization of the grantee corporation, and in contemplation thereof, the said business of manufacturing automobiles has been kept by the grantor, as far as practicable, separated from its other business, and has been known and called sometimes the 'Automobile Department,' and sometimes 'Stevens-Duryea Company,' and separate books of account have been kept, showing not only the dealings on account of said automobile department with third persons, but also its accounts with the grantor corporation, which said accounts include a sales ledger, purchase ledger, cash book and journal, all said accounts, books, bills, etc., are included in this conveyance, and the said grantee shall have full power to sue and collect the same, either in its own name or in the name of the grantor, but at the expense of the grantee; and all accounts and liabilities due from and properly charged to said automobile department or said Stevens-Duryea Company heretofore shall be assumed and paid by the grantee, as a part of the consideration hereof.

"And it is further agreed that at or before the time of the taking of the next inventory of the grantee, the accounts heretofore existing between the grantor and its automobile department, designated as Stevens-Duryea Company, as shown by said books of account or otherwise, shall be balanced, and any indebtedness found to be due from said grantor to said department shall be paid to the grantee, and as a part of the consideration hereof the grantee agrees to pay to the grantor any balance found to be due to it from said department. To have and to hold, all and singular, the said goods and chattels to the said Stevens-Duryea Company and its successors and assigns, to their own use and behoof forever. The consideration of this conveyance, in addition to that above stated, is the transfer to the grantor of 2,000 shares of the capital stock of the grantee, said 2,000 shares being two-thirds of its entire capital stock."

The instrument contained covenants of title and warranty, and ended with a formal clause, reciting the signing of the name of the corporation and the affixing of its corporate seal by Irving H. Page its president and treasurer, on the 17th day of August, 1906. It had also at the end the words, "Signed, sealed and delivered in presence of," The record of the meeting shows that, after the reading, the following votes were passed:

"Voted, that whereas it is deemed for the best interest of this company that the automobile department of the business heretofore conducted by this company under the terms of a

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certain contract between it and J. Frank Duryea should be established on an independent basis, and whereas a new corporation, called the Stevens-Duryea Company, has been formed for that purpose, that Irving H. Page, president and treasurer, be and he is hereby authorized and instructed to execute, in the name and behalf of the corporation, the bill of sale which has been read, and deliver the same to the proper officer of the grantee, upon transfer to said grantee by said Duryea of all his interests, patent rights, etc., and upon receipt of 2,000 shares of the capital stock issued by the Stevens-Duryea Company to persons designated by said Irving H. Page.

"Voted, that upon the sale and delivery of certain property of this corporation to the Stevens-Duryea Company, and upon the acceptance by the treasurer in exchange therefor of certificates representing 2,000 shares of the capital stock of the said Stevens-Duryea Company, the treasurer is hereby authorized and directed to transfer the entire 2,000 shares of the said stock of the Stevens-Duryea Company to the stockholders of record in this corporation, as and for a dividend, said stock to be issued to the stockholders of this company in proportion to their several holdings of its stock, and in the following amounts." Then follow the names of four stockholders, with the number of shares to be transferred to each, making 2,000 shares in all.

This bill of sale was then signed, in the name of the corporation, by I. H. Page, president and treasurer, and the clause of attestation above quoted was signed by two witnesses. A meeting of the directors of the Stevens-Duryea Company was held on the same day an hour and a half later, and the record shows that "the bills of sale and assignments from the J. Stevens Arms & Tool Company and Mr. J. Frank Duryea were read, and their form approved." The following votes were passed:

"Voted, that, in accordance with the vote passed at the last meeting, the bills of sale and assignments which have just been read be accepted upon the conditions therein stated, and that the entire 3,000 shares of the capital stock of this company be issued in exchange therefor, as follows: 2,000 shares to J. Stevens Arms & Tool Company; 1,000 shares to Mr. J. Frank Duryea.

"Voted, that the sum of \$45,000 be, and the same is hereby, appropriated for the payment of a dividend of \$15 per share on the entire capital stock, payable to stockholders of record at the close of this meeting."

On the same day all of the capital stock of the Stevens-Duryea Company was issued, being one certificate of 2,000 shares issued to the J. Stevens Arms & Tool Company, bearing date August 17, 1906, signed by I. H. Page, President, and I. H. Page, Treasurer, which was receipted for on the 17th day of August, 1906, signed by the "J. Stevens Arms & Tool Company, by I.

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H. Page, Treasurer." Immediately after its issuance a writing was made upon the back of the certificate, assigning different numbers of the shares of the stock represented by it to the different members of the corporation, the J. Stevens Arms & Tool Company, in accordance with the distribution previously voted as a dividend. The remainder of the stock of the Stevens-Duryea Company was issued to J. Frank Duryea in a certificate of 1,000 shares, signed by I. H. Page, President and I. H. Page, Treasurer, and receipted for on August 17th by Duryea. J. Frank Duryea assigned this certificate so as to divide the shares, giving some to other persons, and retaining some for himself. On this same day new certificates were issued to all the persons who were to receive the stock under the assignments and distribution provided for, all of which bore date August 17th, and all of which were receipted for on the same day by the other persons to whom the certificates were issued. One of these certificates was issued to I. H. Page, and was receipted for by him. He was the president and treasurer of each of these corporations. These were the only votes or acts of either of the boards of directors touching the transfer of the property that appear in the case. Do they show a contract that took effect on August 17th, or was there nothing but negotiations at that time, which did not ripen into a contract until long afterwards?

If there was any contract at all, it was that set out in the bill of sale, and it passed the title to the property described in the writing. There was nothing that bound either party until that contract took effect. Nothing else in the form of a contract was referred to in their dealings with each other. We are of opinion that, upon the undisputed facts, the contract became binding when the Stevens-Duryea Company accepted the bill of sale which was offered to it in the meeting of its directors, and complied with the conditions on which it was to take effect. The records show previous negotiations. The vote of the directors of this corporation on July 6th shows that the other corporation had previously offered the property for the stock, and the vote is an acceptance of the offer, and a direction to the proper officers of the company to receive the bills of assignment, bills of sale, etc., and to issue the three thousand shares of stock in exchange for them. This shows an agreement of the two corporations upon the terms of the contract, and an arrangement for the completion of the formal contract later. Then, on August 17th, the formal bill of sale having been prepared and read to the directors, there is a vote instructing the president and treasurer of the selling corporation to execute it and deliver it to the proper officer of the grantee, upon a transfer to the grantee of certain rights by Duryea, and upon the receipt of 2,000 shares of its capital stock. Thereupon the president and treasurer executed the bill of sale, and took it to the meeting

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of the other corporation, held later on the same day. The record shows that the bills of sale and assignments from Duryea, together with this bill of sale, were there read and approved, and a vote was taken that they be accepted upon the conditions therein stated, and the capital stock be issued in exchange therefor. The capital stock was then issued by the purchasing corporation, and accepted by the selling corporation and by Duryea. The bill of sale was in the hands of Page, the president and treasurer of the selling corporation, who took it to the meeting under a vote of instruction to deliver it. It remained in the hands of the same person, who was also the president and treasurer of the purchasing corporation which had accepted it by vote and paid for it. The instrument was offered on one side and accepted on the other. The consideration was paid on one side and accepted on the other. Under these circumstances there was no need of a formal transfer of the paper from the right hand to the left hand of the person who was at the same time the president and treasurer of both corporations. When that was done on both sides which was prescribed and intended to give the contract effect, it took effect. All this appears by the writing and the records. The writing shows that no formal delivery, or change of place or any of the articles of property was ever contemplated, and no such change was ever made in connection with the transfer. By the terms of the instrument the stock was to be given for the property. According to the terms of the instrument the stock was given for the property, and was accepted as taken in exchange for it. Moreover, the directors of the Stevens-Duryea Company, including Page, knew that the stock could not lawfully be issued except as paid for by the property. Two at least of the directors of the J. Stevens Arms & Tool Company also knew this fact, for they were at the same time directors of the Stevens-Duryea Company. The above recited facts, that took place on August 17th, constitute a complete execution of the contract on both sides, excepting the ascertainment of the balances to be paid and accounted for, and the passing over of the books of account, which by the terms of the bill of sale was to be done after the title to the property had passed, "at or before the time of the taking of the next inventory of the grantee." The grantee neither had nor could have any property to inventory until after this contract had taken effect. The dividend of the purchasing company voted on August 17th, was paid to the stockholders by checks on August 27th, and the J. Stevens Arms & Tool Company furnished the money for the purpose.

The oral testimony relied on by the plaintiffs cannot change the result which follows, as matter of law, upon the proper interpretation of the records. The plaintiff, I. H. Page, testified that the automobile belonged to the Stevens-Duryea Company at

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the time of the accident, meaning the corporation of that name. After the plaintiffs' case had been closed and the defendant had opened its defense showing its reliance upon the failure of that company to obtain registration of the automobile, he went to his place of business at Chicopee Falls, with two of his attorneys, and with them examined the books and papers of the corporation, and after his return he testified in rebuttal that he wished to change his former testimony as to the ownership of the automobile. Referring to the time of this examination of the books, on a Saturday during the trial, he testified: "It was at that time I discovered that the change in the concern did not take place until September 1, 1906." In cross-examination he said: "From the time that the suit was brought in the name of the Stevens-Duryea Company until I took this stand last Monday, I thought that the Stevens-Duryea Company owned that automobile. * * * And I thought so when I was on the stand that day." His change of opinion seems to have come from a misinterpretation of the books and papers of the corporation in connection with an extended examination of them, made during the trial, after the plaintiffs had rested their cases. Every fact appearing in the transaction of the business and in the books and papers in evidence is inconsistent with a purpose to make up and balance the accounts, after the property had passed, in accordance with the terms of the bill of sale, at some convenient time either before or at the time of the making of its inventory by the purchasing corporation. The name of the purchaser was the same as that which the J. Stevens Arms & Tool Company had used to a considerable extent in conducting that department of its business. The business seemingly, was to be carried on by the same persons and in the same way after the change in proprietorship as before. The interests of individuals represented in the business were nearly, although not exactly the same after the purchase as before. By the terms of the bill of sale the new corporation was to have the benefit of all old accounts afterwards collected and in the subsequent accounting was to assume and pay all old bills then unpaid, just as it would receive and pay moneys in the business to be done after the accounts had been balanced. The fact that the parties made up their accounts and struck their balances as of September 1st, instead of August 17th, has no tendency to show that the contract did not take effect and the property pass on August 17th. The rights of the parties were fixed on that day, although the balances on the one side and the other would depend upon the collections and payments and the state of the accounts on the books up to the time of balancing. The pecuniary result to both parties would be the same whether the accounts were made up on August 17th or on September 1st.

The statement of Page in his testimony in rebuttal, that the

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car belonged to the J. Stevens Arms & Tool Company at the time of the accident, is nothing more than his opinion, and it is not competent evidence to prove title when everything upon which the title depends is established by evidence from records and undisputed facts.

The testimony that Page handed the bill of sale to his bookkeeper, Leonard, and told him to hold it until September 1st, when the inventory was taken, and then turn it over to the Stevens-Duryea Company, is not competent as evidence to show that the contract did not take effect. What had taken place between the two corporations gave the instrument effect, and it was then in Page's hands as evidence of a completed contract, held by him as president and treasurer of the purchasing corporation, for its benefit, as well as for the benefit of the selling corporation, in reference to the liability upon the accounts. So far as technical delivery was important, what had previously occurred constituted a delivery, and Page had no authority to do anything that would deprive the purchasing corporation of the benefit of its contract. When the paper was afterwards in the hands of the bookkeeper he held it by Page's direction, and under his control. In legal effect, it was in Page's hands as an officer of the corporation.

The testimony of Remington was not competent, unless to show action of the board of directors. He said: "Mr. Page told the directors at that meeting (the meeting of the purchasing company on August 17th) that the bill of sale would be held by the J. Stevens Arms & Tool Company until after the inventory was taken, which would be August 31st, and at that time the books would be balanced and the bill of sale turned over to the Stevens-Duryea Company. The directors said that would be all right." The records show that the directors held formal meetings, of which records were kept. Remington, who was the recording officer, made no record of such consent by the board. The by-laws of the corporation are not before us; but it is at least very doubtful whether the action of the board, at a meeting of which a record was kept, can be proved by parole. If the evidence was competent, it has no tendency to show that the title did not pass. The inventory referred to was that mentioned in the bill of sale, and that was to be an inventory of the grantee as owner. In view of all that passed between the parties, this remark can only be interpreted as referring to the complete surrender of the books and papers when the balance had been made up on the books, as contemplated by the bill of sale, after the instrument had taken effect and the property had passed.

By the terms of the statute the registration of the selling corporation was only effective until the automobile was sold. St. 1903, c. 473, § 2. Perhaps the word "sold" as here used should be held to mean sold and delivered. In the present case we have

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no occasion to consider this; for the possession and control of all the property passed on August 17th. This registration could not afterwards cover the automobile unless it again came into the ownership or control of the selling corporation.

In *Dudley v. Northampton Street Railway Company*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561, and in *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, it was held that a person riding upon a highway in an unregistered automobile cannot recover for an injury caused by the negligent conduct of another traveler. In *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 810, 125 Am. St. Rep. 355, a similar doctrine was stated in reference to a plaintiff claiming damages caused by a defect in a highway. The plaintiffs contend that the principle is not applicable to the claims in these actions, founded on the statute requiring a bell to be rung or a whistle sounded for the protection of travelers at railroad crossings. St. 1906, c. 463, pt. 2, §§ 245-247. It was held in *Dudley v. Northampton Street Railway Company*, supra, that St. 1903, c. 473, §§ 1-3, was intended to outlaw unregistered machines, "and to give them, as to all persons lawfully using the highways, no other right than that of being exempt from reckless, wanton or willful injury." It is said that "the Legislature intended to put these forbidden and dangerous machines outside the pale of travelers." There is no doubt that the purpose of the legislation as to signals at railroad crossings was to protect travelers on the ways. The section relates only to signals from the engine when approaching a way or traveled place. Section 245, above referred to, was originally enacted as St. 1871, c. 352, under the title, "An act for the better protection of travelers at railroad crossings." Although the language of the body of the act does not limit the liability to persons using a way as travelers, we are of opinion that the general purpose of the statute and the language of its title call for a construction that makes it inapplicable to persons upon a crossing for purposes other than travel. This is in accordance with the construction given, in different cases, to the statute requiring the erection of fences along the sides of a railroad. *Menut v. Boston & Maine Railroad*, 207 Mass. 12, 92 N. E. 1032; *Eames v. Salem & Lowell Railroad Company*, 98 Mass. 560, 96 Am. Dec. 676; *McDonnell v. Pittsfield & North Adams Railroad Corporation*, 115 Mass. 564; *Darling v. Boston & Albany Railroad Company*, 121 Mass. 118. Under this construction the plaintiffs cannot avail themselves of this statute, for, under the cases above cited, persons riding upon the streets in an unregistered automobile have not the right of travelers.

If we consider the particular provisions of the statute, we reach the same result. A person cannot have the benefit of the statute if he is acting in violation of law and his unlawful act

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contributes to the injury. St. 1906, c. 463, pt. 2, § 245. Hancock, in operating an automobile that was not registered, was acting in violation of law. Neither he nor the others in the automobile, of whose persons he had charge in running the machine, can recover under the statute, if his unlawful act contributed to the injury. Under the early decisions in this commonwealth, it is too plain for argument that such unlawful conduct would preclude recovery. Under later decisions, the distinction between unlawful conduct which is a cause of an injury that which is a mere condition of it has been thoroughly established in the law of this commonwealth. *Newcomb v. Boston Protective Department*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Black v. New York, New Haven & Hartford Railroad Company*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148; *Farrell v. B. F. Sturtevant Company*, 194 Mass. 431-434, 80 N. E. 469. In many other states, in determining whether an unlawful act is a direct and proximate cause of an injury, the tendency of the decisions is towards the establishment of the doctrine that, if there is an unlawful element in an act, which in a broad sense may be said to make the act unlawful, this will not preclude recovery unless the unlawful element or quality of the act contributed to the injury, so that, if the act of a plaintiff may be considered apart from a certain unlawful quality that may enter into it, and if so considered there is nothing in it to preclude recovery, the existence of the unlawful quality is of no consequence unless in some way it had a tendency to cause the injury. It would not be easy to reconcile all the decisions in this commonwealth. Some of the later ones, while not attempting to point out exactly the line of distinction seem to be nearly in harmony with this doctrine, as it is sometimes stated elsewhere.

But if it should be held that a violation of the law as to the use of sleigh bells by a traveler would not preclude him from recovery under this statute, so long as such an unlawful element in his conduct did not contribute to the injury, or in case of a like holding if there was a violation of the law of the road by turning to the left instead of to the right in meeting another team by a traveler when about to cross a railroad (see *Spofford v. Harlow*, 3 Allen, 176; *Hall v. Ripley*, 119 Mass. 135), it does not follow that plaintiffs can recover in cases like these. While, in the cases just supposed, it might be held that the unlawful part of the conduct, taken by itself, was not a cause of the injury, and that the act might be considered apart from the unlawful element in it which had no direct connection with the injury, it is not so in the present case. Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operation that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering

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upon the crossing the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of law and a trespasser. His unlawful act, in walking to that point and thus coming into collision with the engine, would directly contribute to his injury, and would preclude him from recovery.

The judge was right in setting aside the verdicts. The use of the unregistered automobile requires the entry of a judgment for the defendant in each case.

Judgments for the defendant.

CAVANAUGH *v.* BOSTON & M. R. R.

(Supreme Court of New Hampshire, Hillsborough, March 7, 1911.)

[79 Atl. Rep. 634.]

Trial—Argument of Counsel.—In an action for injuries at a crossing, that plaintiff's attorney in his argument said that if the jury desired to "protect this railroad, and say they were in the exercise of ordinary care," they could do so, but on objection withdrew the expression and asked the jury to disregard it, and the court instructed them to pay no attention to it, the error was harmless.

Railroads—Accident at Crossing—Negligence—Question for Jury.—Where, in an action for the death of plaintiff's intestate, a girl, at a crossing, there was evidence that the engineer of defendant's train knew the team was approaching the crossing in ignorance of the coming train at a time when he could have given warning or applied the brakes in time to prevent collision, and from the evidence it might have been found that he did neither until too late, whether the engineer's failure to act was negligence causing the injury was for the jury.

Railroads—Accident at Crossing—Proximate Cause.*—Where danger of the driver of a wagon at a crossing was created by her own negligence, yet, if the engineer of defendant's train by due care

*See third foot-note of *Bourrett v. Chicago & N. W. Ry. Co.* (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284.

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could have prevented the injury, the failure to exercise such care was the sole proximate cause of the injury.

Railroads—Accident at Crossing—Negligence of Trainmen.*— Where trainmen would anticipate a collision with a traveler at a crossing and could avoid it, their negligent failure to do so is the responsible cause of the injury, if at the time of the discovery the traveler could not save himself.

Bingham and Peaslee, JJ., dissenting.

Exceptions from Superior Court, Hillborough County; Pike, Judge.

Action by James T. Cavanaugh, administrator, against the Boston & Maine Railroad. Judgment for plaintiff, and defendant excepts to the ruling of the Superior Court in denying its motion for a nonsuit and to the remarks of plaintiff's counsel. Exceptions overruled.

Edith Bolis, the plaintiff's intestate, was killed by collision with the defendants' train upon a highway grade crossing. At the time of her death she was about 13 years old. She was driving alone in an open wagon, immediately following a carriage in which were three adults. She was driving slowly, would have seen the train if she had looked, and could have stopped within six feet of the crossing. The engineer testified that he saw the teams approaching the crossing when the train was about 72 rods and the forward carriage about 80 rods distant therefrom; that the teams did not slacken their speed as teams usually do; that he sounded the whistle when he was 40 or 50 rods from the crossing and continued to sound it until the team was struck; that, when he failed to attract the attention of the travelers, he applied the brakes for an emergency stop, this being done when the train was about 40 rods from the crossing. The teams drove upon the crossing; the first one clearing the locomotive. There was evidence tending to show that the whistle was not sounded nor the brakes applied until just before the crossing was reached, and that the train could have been brought to a full stop within 500 feet.

The defendants' motion for a nonsuit, on the ground that there was no evidence of care on the part of the plaintiff's intestate at the time of the accident, was denied, subject to exception. The only question submitted to the jury was the liability of the defendant under the principles of the "last clear chance" doctrine.

In argument, counsel for the plaintiff said: "Gentlemen, take this case. Do what is right; that is all. Look it over; and if you want to condemn the little 13 year old girl because she didn't stop, if you want to condemn this little girl and protect this railroad, and say they were in the exercise of ordinary care, do so." Objection was made to the use of the word "protect," whereupon counsel withdrew the expression and asked the jury

See () on preceding page.

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to disregard it. They were also instructed by the court to pay no attention to it. The defendants claimed an exception, which was allowed.

Doyle & Lucier, for plaintiff.

Hamblett & Spring, for defendant.

PARSONS, C. J. [1] The argument contained no statement of fact not in evidence. If the use of the word "protect" was an appeal to the jury to decide the case upon grounds which they could not properly take into consideration, the error was one of law which was cured by the instruction of the court. *Seeton v. Dunbarton*, 73 N. H. 134, 137, 59 Atl. 944; *Leavitt v. Telephone Co.*, 72 N. H. 290, 292, 56 Atl. 462.

[2] The remaining exception is to the denial of the motion for a nonsuit, which was asked upon the ground of the absence of any evidence of care on the part of the person injured. As the case is drawn, it may be inferred that the existence of evidence of the defendants' fault was conceded; but, if such concession was not intended, this branch of the question requires little consideration. From the testimony of the engineer, it could be found that he knew the teams were approaching the crossing in ignorance of the coming train, at a time when he could have given warning or applied the brakes in season to prevent a collision; and from all the evidence it might be found he did not do either until too late. What the facts were, and whether the engineer's failure to act was negligence causing the injury, were questions for the jury. The motion was properly denied if the jury could be permitted to find from the evidence of the conduct of the plaintiff's intestate, a girl of 13 years, that she exercised such care as could reasonably be required of such a person under all the circumstances of the case, or, if she did not, that the defendants' negligence as distinguished from hers was the sole proximate cause of the injury. The first question was not submitted to jury, nor does the case disclose the form in which the second was presented to them.

[3] Upon the evidence in the case, it was for the jury to say whether the exercise by the trainmen of such care as the circumstances required, after the engineer discovered the deceased, would have prevented the injury. If it would, the failure to exercise such care was the sole proximate cause of the injury, although the danger was created by the deceased's negligent inattention to the situation. This has been held in several cases upon facts identical with those presented here (*State v. Railroad*, 52 N. H. 528; *Parkinson v. Railway*, 71 N. H. 28, 51 Atl. 268; *Little v. Railroad*, 72 N. H. 61, 55 Atl. 190, s. c. 72 N. H. 502, 57 Atl. 920; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522; *Altman v. Railway*, 75 N. H. 573, 78 Atl. 616), and was conceded in *Stearnes v. Railroad*, 75 N. H. 40, 46, 71 Atl. 21.

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The law does not justify an avoidable injury to the person of one who carelessly exposes himself to danger. *Nashua, etc., Co. v. Railroad*, 62 N. H. 159. While the rule is clear, its application to the various situations found in this class of cases may involve some "nice distinctions." *Gibson v. Railroad*, 75 N. H. 342, 74 Atl. 589. But the difficulties arise from the facts, not from the law "While all [cases] are governed by the fundamental principle, that he, only, who by ordinary care can and does not prevent an injury is responsible in damages, it is impossible to formulate a rule in language universally applicable. A statement of the law correct in its application to one set of facts may be inaccurate when applied to another." *Nashua, etc., Co. v. Railroad*, 62 N. H. 159, 164. The danger may be created by the intervention of both parties; neither discovering the other until neither can avoid the resulting injury. In such cases the injury and the danger result from the same cause, the negligent inattention of both parties, and there can be no recovery. *Gibson v. Railroad*, 75 N. H. 342, 74 Atl. 589; *Batchelder v. Railroad*, 72 N. H. 528, 57 Atl. 926.

If the trainmen see the traveler approaching the crossing, there still may be no evidence upon which it can be found that they ought to have apprehended the traveler would go upon the crossing in advance of the train. *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443. In these cases the plaintiffs fail, not because of their negligence, but because of the absence of negligence in the defendants. The traveler may be seen by the trainmen in the act of crossing, at a time when they can avoid the injury and the traveler cannot. *Stearns v. Railroad*, 75 N. H. 40, 71 Atl. 21; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522. The train may be discovered by the traveler at a time when he could avoid injury by care. In such case there can be no recovery, even if the railroad employees could have avoided the injury by like care. *Shannon v. Railroad*, 71 N. H. 286, 51 Atl. 1074. The person injured may be incapable of taking care, and the railroad liable for negligent failure to discover him if they ought to have anticipated his presence in that condition. *Edgerly v. Railroad*, 67 N. H. 312, 36 Atl. 558. Such a case does not differ from that of property negligently permitted by the owner to be or to go in the way of the train. *Laronde v. Railroad*, 73 N. H. 247, 60 Atl. 684. The traveler may be discovered by the trainmen on the crossing, or approaching it, as in this case, under circumstances indicating inattention to the train or the crossing.

[4] In this situation, the cases cited hold that if ordinary men, with the information the trainmen have, would anticipate a collision at the crossing and avoid it, the trainmen's negligent failure to do so is the responsible cause of the injury. The rule of most general application deducible from the authorities is that

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the defendants are liable if, upon discovery of the danger, the plaintiff cannot save himself, while the defendants upon their discovery of the danger could have avoided the injury. *Altman v. Railway*, 75 N. H. 573, 78 Atl. 616; *Little v. Railroad*, 72 N. H. 61, 55 Atl. 190, s. c. 72 N. H. 502, 57 Atl. 920; *Parkinson v. Railway*, 71 N. H. 28, 51 Atl. 268; *State v. Railroad*, 52 N. H. 528.

As the negligence of the party injured in failing to observe the approach of the train continues until the very moment of the accident, or at least until it is too late for either party to avoid the injury, and since he could have stopped in a place of safety after the time when the trainmen could have done anything to prevent the accident, it has been claimed that, if his negligent failure to observe and stop is not subsequent to any negligence in the operation of the train, it is at least concurrent, and there can be no recovery. The conclusion that one conscious of danger of serious injury to a human being if he persists in the course which he is pursuing, which he can prevent by care, should be discharged from responsibility because of negligent ignorance of the danger in the person injured, is so fundamentally unjust and contrary to natural reason that few cases are to be found that carry the logic of the rule of contributory negligence to that extent. With substantial unanimity, recovery is permitted in such cases, either upon the ground that the lack of attention in the party injured is not the proximate cause of the injury, or that the failure of the trainmen to act under such circumstances so far partakes of the nature of a wanton or intentional wrong that the law as to contributory negligence has no application. *Murphy v. Deane*, 101 Mass. 455, 463, 3 Am. Rep. 390; *Union Pacific Ry. v. Cappier*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 516, note; *Dyerson v. Railroad*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, note; 1 Thomp. Com. Neg. § 238; 2 Thomp. Com. Neg. § 1598; Cool. Torts, *674. It may be that neither explanation is strictly logical, and that the real foundation for the rule is merely its fundamental justice and reasonableness. The justice of the rule that "the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence" (*Grand Trunk Ry. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485), may be a sufficient foundation for it.

Cases where at the time of the injury the plaintiff is not conscious of the danger in season to avert it, either because he is drunk, asleep, absorbed in introspection, or otherwise inattentive, while the defendant has knowledge of the danger, simply fall into the class where the defendant is present and the plaintiff is absent. They are governed by *Davies v. Mann*, 10 M. & W. 546. The result in that case would have been the same if the plaintiff

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had been asleep by the wayside within shouting distance of his donkey. The plaintiff's inability to control the situation is the test, and it is immaterial whether he is not in actual charge of the subject of injury because the absence of his body shows he could not have been, or the fact be proved by showing that for other cause he, himself, was not, in control. Whether, under such circumstances, the defendant upon the information he has ought to have known of the plaintiff's condition, that he was drunk, asleep, nonjudging, or not observing, bears on the defendant's negligence. If it cannot be found he ought to have known the plaintiff's condition, he is not liable; if he ought, he may be.

"The law no more holds one responsible for an unavoidable, or justifies an avoidable injury to the person of one who carelessly exposes himself to danger, than to his property similarly situated in his absence. The law deals with the behavior of the parties in the situation in which it finds them, regardless of how that situation was produced. If the two parties approach the point of collision asleep or inattentive, and neither wakes up or becomes alive to the situation, the concurrent negligence of both prevents a recovery from either; but if one wakes up, or becomes aware of the danger existing from the fact that another asleep or inattentive is thoughtlessly in danger of injury by him, his fault, if he can but does not avert the injury from such danger, is alone the cause of the subsequent injury. There is no difference between sailing the seas with a rudderless ship and traversing the highway with a rudderless mind. One knowing the situation, who can by care avert a collision and does not, is chargeable for the resulting loss, despite the uncontrolled character of the other's progress." *Nashua, etc., Co. v. Railroad*, 62 N. H. 159.

The injury in this case arose because the defendants with their train and the deceased with her team both attempted to occupy at the same time a portion of a public highway which each had the right to use, but which neither had the right to occupy when it was in use by the other. Each was bound to such acts as would constitute care under the circumstances, to prevent an attempt at such joint occupation. While ordinarily due care would require that the wagon should wait and allow the train to go by, the failure to exercise such care and the negligent occupation of the crossing by the wagon gave the train no right to attempt to pass at the same time. *State v. Railroad*, 52 N. H. 528, 556; *Huntress v. Railroad*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Little v. Railroad*, 72 N. H. 502, 503, 57 Atl. 920; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403. Whether the use of the crossing at the time by the traveler was careful or negligent, the train could not lawfully use it while it was in use as a part of the highway. Having notice that the traveler was

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about to use it at a time when they could have refrained from entering upon it, they are as much in the wrong and as fully the sole authors of the resulting injury as the traveler would be who attempted to pass with knowledge that it was in use by the train.

The situation is simply this: Both parties were proposing to exercise a common right which could not be enjoyed by both at the same time; the defendants knew of the deceased's proposed use; the deceased did not know the defendants' purpose. If the deceased was in fault for not knowing the defendants' desire then to pass over the crossing, the defendants were in fault for attempting to cross while the path was in use. As the deceased's negligent occupation of the crossing did not increase the defendants' right to use it, they cannot recover of her for injury from their wrongful attempt, but must pay the damage done to her by their wrongful act. As her negligent act gave them no right to cross, it is immaterial in her suit for the injury whether her act of which they had notice was negligent or careful.

Exceptions overruled.

WALKER and YOUNG, JJ., concur.

MORGAN v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, May 3, 1911.)

[130 N. W. Rep. 1058.]

Evidence—Weight—Positive or Negative Testimony.*—The testimony of a witness, approaching a railroad crossing, that he looked and listened for a train from a point 20 rods from the crossing until he was close to it, that he did not hear a bell or whistle, that he listened for such signals, and could have heard both, had they been given, is positive testimony that the signals were not given, and is entitled to as much weight as the testimony of a witness who, in the same position, testifies that he heard the signals.

Railroads—Accidents at Crossings—Proximate Cause—Question for Jury.—In an action for the death of horses struck by a train at a crossing, the issue of the proximate cause of the injury held, under the evidence, for the jury.

Railroads—Collisions at Crossings—Contributory Negligence.—Whether a driver of horses killed by a train at a crossing, was guilty

*See foot-note of *Anspach v. Philadelphia, etc., Ry. Co. (Pa.)*, 35 R. R. R. 91, 58 Am. & Eng. R. Cas., N. S., 91; third headnote of *Slaterry v. New York, etc., R. Co. (Mass.)*, 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795; foot-note of *Louisville & N. R. Co. v. O'Nan (Ky.)*, 34 R. R. R. 528, 57 Am. & Eng. R. Cas., N. S., 528.

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of negligence in the manner he approached the crossing, and in his attempt to control the horses after they became frightened, held, under the evidence, for the jury.

Appeal from District Court, Hardin County; C. G. Lee, Judge.

Suit to recover the value of property destroyed by collision with one of defendant's trains. Verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

W. H. Bremer and J. H. Scales (George Seevers, of counsel), for appellant.

Chas L. Hays, for appellee.

SHERWIN, C. J. One of the defendant's trains killed a pair of horses and destroyed other property belonging to the plaintiff at a highway crossing. The plaintiff alleged negligence because of a failure to give the statutory signals and negligence in operating the train at an excessive and dangerous rate of speed, considering the location of the crossing. The crossing in question is at the north end of a cut and on a slight curve in the defendant's road to the east. The plaintiff, with his team, was going east on the highway, and when a short distance from the crossing the team became frightened at a train coming from the south, broke away from the plaintiff, and were killed by collision with the train on the crossing.

[1] The appellant contends that there was no evidence from which the jury could find that the whistle was not blown and the bell rung for this crossing, as required by law; but in this the appellant is clearly mistaken. The plaintiff and a witness who was approaching the crossing immediately ahead of him testified that they looked and listened for a train from a point 20 rods west of the crossing until they were close to it, and that they did not hear a bell or whistle. They were both where they could have heard both the whistle and the bell, had they been sounded, and both were listening for such signals. Their testimony was not, therefore, merely negative. It was in the nature of positive testimony, because, if the witnesses were where they could not fail to hear, if giving the matter attention, and they were in fact looking out for and listening for the signals which they know should be given, their testimony would be entitled to as much weight as that of a witness who in the same position heard the signals. *Mackerall v. Railway Co.*, 111 Iowa, 547, 82 N. W. 975; *Stanley v. Railway Co.*, 119 Iowa, 526, 93 N. W. 489; *Selensky v. Railway Co.*, 120 Iowa, 113, 94 N. W. 272; *Hoffard v. Railway Co.*, 138 Iowa, 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797.

[2] It is further said that there is no evidence that the failure to give the signals was the cause of the plaintiff's loss. We think

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otherwise, however. The plaintiff testified that his team was afraid of the cars and of the smoke emitted by engines, and that he was looking out for the train as he went toward the crossing. He was driving, walking behind his wagon, and when the horses saw the smoke of the train rolling up over the bank of the cut close to them they became frightened and broke away. Had the plaintiff been advised of the coming of the train by the proper signals, it is fair to presume that he would have stopped his team in a safe place and had it under better control. Under the facts presented, we think the question of proximate cause was for the jury. *Ward v. Railway Co.*, 97 Iowa, 50, 65 N. W. 999.

[3] As we have already said, the plaintiff testified that he looked and listened for the approach of this train. The conformation of the land between the highway and the railroad south of the crossing was such that a train could not be seen between the point where the horses became frightened and a point several rods farther west; hence the plaintiff must necessarily rely on the statutory signals. We think the question of his negligence, both in this respect and in respect to his attempt to control his horses after they became frightened, was for the jury. Although the appellant does not mention the matter in its brief of points, it argues that the issue of excessive speed should not have been submitted to the jury, and that the court erred in instructing on the subject of the defendant's negligence aside from the failure to give the statutory signals. We do not propose to notice these matters further than to say that, while the plaintiff's pleading is not as clear as it might be made, we still think it fairly admits the construction given it by the trial court.

We find no error in the record, and the judgment must therefore be affirmed.

LOUISVILLE & N. R. Co. v. WILKINS' GUARDIAN.

(Court of Appeals of Kentucky, May 10, 1911.)

[136 S. W. Rep. 1023.]

Damages—Personal Injuries—Excessive Damages.—The spinal cord of a 3½ year old boy was injured by the person carrying him upon alighting from a passenger train falling at the platform, resulting in a curvature of the spine and inability to control his kidneys and bowels. The boy cried continuously for two weeks after the injury, and repeatedly placed his hand on the back of his head, is slow of speech and thought, and has not developed since the injury as an ordinarily healthy child should, being unable to climb steps and walk without difficulty. Held, that a verdict of \$5,000 given in an action for such injuries was not excessive.

Appeal and Error—Verdict—Damages—Conflicting Evidence.—An assessment of damages for personal injuries by the jury on conflicting evidence will not be disturbed.

Damages—Personal Injuries—Instructions.—Where, in an action against a railroad company for personal injuries to a child in alighting, defendant claimed that the boy was born with a club foot, had never been able to walk, talk, or handle himself physically like other children, an instruction was proper denying recovery for injuries or suffering not resulting from the accident.

Damages—Instructions—Cause of Injuries.—An instruction in an action for personal injuries in alighting from defendant's train that if "the injuries, if any he has received for which the plaintiff sues in this action, were not caused while being carried from" defendant's car, "by reason of the unsafe condition of its platform but were sustained in some other way, or resulted from some other cause or from natural infirmity," the jury should find for defendant, was subject to criticism as not excluding in terms damages resulting from some other cause than defendant's negligence, if the jury found that there were also damages resulting from such negligence.

Appeal and Error—Instructions Given for Appellant—Scope of Requests.—Appellant cannot complain of error in an instruction given upon its motion on the ground that the trial court did not further instruct on the same subject, even if it might properly have done so.

Appeal and Error—Review—Presentation Below—Motion for New Trial.—Alleged improper argument by appellant's counsel cannot be considered on appeal where it was not assigned as a ground for a new trial.

Negligence—Imputed Negligence—Negligence of Parent.*—Con-

*See first foot-note of *Feldman v. Detroit United Ry.* (Mich.), 37 R. R. R. 685, 60 Am. & Eng. R. Cas., N. S., 685; third foot-note of *Berry v. St. Louis, etc., R. Co.* (Mo.), 33 R. R. R. 243, 56 Am. & Eng. R. Cas., N. S., 243.

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tributory negligence of a parent in failing to give a 3½ year old child proper medical treatment after receiving the injuries sued for will not be imputed to the child for the purpose of mitigating the damage suffered to the extent the injury was aggravated by the parent's neglect.

Damages—Punitive Damages—Right of Recovery.†—Punitive damages may only be awarded in a personal injury action where defendant acted wantonly, recklessly, or oppressively, or with such malice as implies criminal indifference to civil obligations, and should not be allowed in an action against a railroad company for personal injuries to a young child caused by one carrying it falling upon stepping into a hole 10 or 12 inches deep, made in front of a step from which passengers alighted, by the removal of cross-ties.

Appeal from Circuit Court, Bullitt County.

Action by Elias W. Wilkins' guardian against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Chas. H. Moorman, J. F. Combs, Charles Carroll, and Benjamin D. Warfield, for appellant.

Ben Chapeze and Thomas Cochran, for appellee.

MILLER, J. On the afternoon of December 14, 1908, Mrs. John Wilkins, with her two children, went from Louisville to Shepherdsville on the train of the appellant. When they reached Shepherdsville about 5:15 p. m., it was dark, and there were no lights upon the platform where the passengers alighted, except the lanterns used by the conductor and brakeman. Mrs. Wilkins' uncle, Samuel Harshfield, accompanied her upon the trip, and assisted her in getting the children from the car to the station. Harshfield was carrying the appellee, Elias W. Wilkins, who was about 3½ years old, and preceded Mrs. Wilkins when they left the car. Elias was sitting on Harshfield's arm, and when Harshfield stepped from the car steps to the screening station platform, he stepped into a hole, and was thrown headlong, with the child in his arms. There is some contradiction in the evidence as to whether the child struck the ground or was caught before reaching the ground. However, Harshfield carried Mrs. Wilkins and the two children to his home some three miles in the country, where they remained for several weeks. This suit was brought by the guardian of Elias W. Wilkins to recover damages sustained by reason of the fall above described, and resulted in a

†For the authorities in this series on the question when exemplary or punitive damages may, and may not, be recovered, see last foot-note of *Black v. Charleston, etc., Ry. Co. (S. C.)*, 38 R. R. R. 541, 61 Am. & Eng. R. Cas., N. S., 541; foot-note of *Illinois Cent. R. Co. v. Dodds (Miss.)*, 38 R. R. R. 508, 61 Am. & Eng. R. Cas., N. S., 508; third foot-note of *Baltimore, etc., R. Co. v. Strube (Md.)*, 37 R. R. R. 319, 60 Am. & Eng. R. Cas., N. S., 319.

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verdict and judgment for \$5,000, and from that judgment the company appeals.

The action is based upon the alleged gross negligence and carelessness of the appellant, its servants, agents, and employees, which resulted in permanently injuring the boy Elias. While there is a sharp conflict in the testimony as to how the accident happened, or even that it happened at all, there was ample testimony authorizing the submission of that question, and the effect of it as well as the negligence of appellant in bringing it about to the jury. There was testimony to the effect that appellant had removed from its track several cross-ties which abutted against the station platform, and that in doing so a hole some 10 or 12 inches deep was left immediately in front of the step from which passengers alighted in leaving the car. The evidence also tends to show that the boy received substantial injuries in the spinal cord, which resulted in a curvature of the spine, accompanied by an inability to control his kidneys and bowels. He cried continuously for about two weeks after the accident, would repeatedly place his hand upon the back of his head, has shown a slowness of speech and thought, and has not developed in his growth since that time as an ordinary healthy infant should have developed. He walks with difficulty, and cannot climb steps, as other children do, without difficulty and apparent exertion. Appellant contends that the child has never been a normal child, and that the deficiencies under which it labors are congenital, and not the result of the accident. The questions of the existence of the hole, the accident that followed, and the injuries that were received by the boy, and their extent were questions for the jury. We have only to consider the questions of law involved in submitting those questions to the jury.

[1, 2] 1. Appellant insists that in view of the uncertainty of the evidence as to whether or not the accident happened, as alleged, or that the infant was injured at all, or as to what his future condition will be as a result of his alleged injuries, the verdict is excessive. These questions of fact were vigorously contested before the jury upon evidence that would have sustained a finding either way; and, it being the province of the jury to determine those questions, we cannot, under the circumstances, interfere with their finding. If the boy was injured by reason of the accident, as claimed by his guardian (and there was evidence to sustain that claim), the recovery of \$5,000 is not excessive.

2. Appellant further contends that instruction No. 5 did not properly instruct the jury as to their duty not to find anything for the appellee by reason of any other injury or natural infirmity from which he may have suffered. The instruction read as follows: "The court instructs the jury that the injuries, if any he has received, for which the plaintiff sues in this action, were not

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caused while being carried from its car by reason of the unsafe condition of its platform, but were sustained in some other way, or resulted from some other cause, or from natural infirmity, the law is for the defendant and the jury should so find."

[3] According to appellant's theory, the boy Elias had been born with a club foot, and had never been able to walk, talk, or handle himself physically as other children of his age could do. Under the authority of the *L. & N. R. Co. v. Kingman*, 35 S. W. 264, 18 Ky. Law Rep. 82, an instruction denying a recovery in this case for injuries, suffering, or causes other than the accident complained of was proper.

[4] It will also be observed that the instruction above given does not clearly segregate the two classes of damages from each other, but only directs the jury to find for the defendant if the injuries resulted from some other cause than that alleged in the petition, or from natural infirmity. It does not, in terms, provide for an exclusion by the jury of damages resulting from some other cause or injury if they should find that there were also damages resulting from the negligence set forth in the petition.

[5] In this respect the instruction might be subject to criticism under ordinary circumstances; but it cannot be relied upon as a reversible error in this case, for the reason that the instruction as drawn was given upon the motion of the appellant, and the court gave no other instruction in lieu of it. It was true it was held in *L. & N. R. Co. v. King's Administrator*, 131 Ky. 356, 115 S. W. 196, that where an instruction offered by a party was not technically correct, and for that reason was refused by the court, it was nevertheless the duty of the court, when such instruction had been offered and refused, to prepare and give a proper instruction upon that point. This rule, however, does not apply when the court gives the instruction asked. It is not the duty of the court to give all the law of the case in a civil action unless it is asked by the parties in instructions covering the questions upon which they desire instructions; and, where the court has given an instruction in the terms asked by a party, he, having obtained all he asked, cannot complain that the court has not gone further than he asked by giving other instructions, although it might properly have done so.

[6] 3. It is further insisted that the case should be reversed because of the misconduct of the appellee's attorney in his closing argument to the jury; and a stenographic report of his objectionable remarks has been incorporated in the bill of exceptions. This alleged error, however, was not assigned as a ground for a new trial, and for that reason cannot be considered upon appeal. *Acme Mills & Elevator Co. v. Rives*, 141 Ky. 783, 133 S. W. 786.

4. Appellant offered, and the court refused to give, instruc-

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tion No. 7, which reads as follows: "The court instructs the jury that it was the duty of those having the plaintiff, Elias Wilkins, under their control to use all reasonable means to relieve the injuries, if any, he received at the time and place mentioned; and if they failed to do so, and if by reason thereof said injuries which were received by reason of the unsafe condition of defendant's platform were aggravated or recovery therefrom retarded, they should not consider such aggravation or any suffering or injury resulting therefrom in estimating the damages, if any, to plaintiff." The evidence tended to show that for several months after the accident the parents of Elias did not give him any medical attention beyond the ordinary home remedies that the family could supply, although the child during most of that time was nervous, crying, and complaining by reason of the accident.

[7] It is a general and universal rule of law in regard to damages that every person must do all that can reasonably be done to render the damage for any act or omission as light as possible. *I. C. R. R. Co. v. Gheen*, 112 Ky. 703, 66 S. W. 639, 68 S. W. 1087, 23 Ky. Law Rep. 1952, 24 Ky. Law Rep. 68. In order, however, to apply the rule to this case, we would be required to impute to the infant the subsequent negligence or omission of its parents, or of those standing in loco parentis. This question was considered at some length in *South Covington & Cincinnati Street Railway v. Herrklotz*, 104 Ky. 400, 47 S. W. 265, 20 Ky. Law Rep. 750, wherein, after a review of the authorities, this court reached the conclusion that an infant less than four years of age could not be charged with contributory negligence by reason of the failure of itself or of its parent to exercise reasonable care to avoid an injury. And it must be admitted there is still stronger reason for exempting the infant from the negligent omission of those having charge of him to do some subsequent act to preserve his life or health. In 29 Cyc. 553, the rule is formulated as follows: "According to the great weight of authority, in an action brought for the benefit of a child who has sustained injuries through the negligence on the part of the parents or those standing in loco parentis will not be imputed to the child, nor bar a recovery by him." In his work on Negligence, in speaking of the New York rule, which holds that negligence may be imputed to a child, Judge Thompson says: "That it should be adhered to in any enlightened jurisdiction with respect to children is a reproach to the judges who uphold it. An adult person, when he commits his person to the custody of another, does so at least voluntarily. An infant does not select his custodian. It is selected for him by the laws of nature, or by circumstances beyond his control. Certainly there is no reason why the ordinary principle that, where one is injured by the concurring neg-

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ligence of two persons, he has an action against either or both, should not apply in the case of an injury to a child, unless the imputation is to be put upon the law of denying to feeble and helpless infancy the same measure of protection which it accords to adults. Such a conception is cruel, heartless, and wicked. It can only hold in jurisdictions where property is placed above humanity." The instruction asked was properly refused.

[8] 5. Finally, exception is taken to the second instruction given the jury upon the motion of appellee, upon the ground that it authorized the recovery of punitive or exemplary damages, in addition to compensatory damages. That instruction reads as follows: "If the jury shall find for the plaintiff, they should award him such a sum in damages as they shall believe from the evidence fairly and reasonably compensate him for any pain and suffering, mental and physical, if any of either, which he has sustained, or which the jury may believe from the evidence it is reasonably certain he will hereafter suffer by reason of his injuries, if any, and for any permanent impairment of his power to earn money directly resulting therefrom after he shall have arrived at the age of twenty-one (21) years; and if the jury shall believe from the evidence that the plaintiff's injuries, if any he has sustained, were caused and brought about by gross negligence upon the part of the defendant company and its agents and employees, then, in such event, in addition to compensatory damages, the jury may award the plaintiff such a sum in punitive damages as they may deem proper under all the circumstances proved in the case, not to exceed in all, however, the sum of thirty thousand (\$30,000.00) dollars, the sum sued for." In 13 Cyc. 112, it is said: "Exemplary damages can only be awarded in case of personal injuries where the negligence or injury complained of is malicious or wanton or the negligence gross. The act must partake of a criminal or willful nature, and, in the absence of any evidence to that effect, the damages must be confined to compensation only. If the jury find as a fact from the evidence that defendant has been guilty of negligence so gross as would show a reckless indifference to human life or human society, or to indicate recklessness, wantonness, or ill will, they are at liberty to add exemplary damages. Exemplary damages have often been claimed in case of a railroad accident, but, in order to recover the same, there must be shown an entire want of care as amounts to gross negligence."

The Kentucky rule is in accord with the general rule above laid down. In *McHenry Coal Co. v. Sneddon*, 98 Ky. 686, 34 S. W. 228, 17 Ky. Law Rep. 1261. Sneddon was an employee in a coal mine, and while engaged in hauling coal in the mine was injured by the team he was driving colliding with the team driven by another employee. In reversing the case for error

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in giving an instruction for punitive damages. Chief Justice Pryor said: "We are satisfied, however, that it is not a case for punitive damages; and while it is difficult to establish any certain rule by which trial courts are to be controlled in this class of cases, and the instructions must be governed by the facts of each case, it is nevertheless well settled that it is not every case of gross negligence where punishment in the way of damages may be inflicted. Where the facts conduce to show reckless, willful, or malicious conduct on the part of the party charged with the wrong, exemplary damages may be awarded. There is no evidence of the presence of malice or reckless conduct on the part of the superintendent, as indicating a purpose to have the appellee injured, or a reckless disregard of the safety of his person, and therefore the instruction as to punitive damages should have been refused. The instruction should have confined the jury, if they returned a verdict for the plaintiff, to compensatory damages only." In the late case of *Central Kentucky Traction Company v. May*, 126 S. W. 1093, this court reannounced the foregoing rule in the following language: "Punitive damages are not authorized and should never be allowed in any case, where there is not some evidence tending to show that the defendant has acted maliciously, willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others (*Koestel v. Cunningham*, 97 Ky. 421 [30 S. W. 970, 17 Ky. Law Rep. 296]), or where there is an absence of malice or reckless disregard of the safety of plaintiff's person (*McHenry Coal Co. v. Sneddon*, 98 Ky. 684 [34 S. W. 228, 17 Ky. Law Rep. 1261]).' *Koestel v. Cunningham*, 97 Ky. 421, 30 S. W. 970, 17 Ky. Law Rep. 296, *Southern Railway Co. v. Goddard*, 121 Ky. 578, 89 S. W. 675, 28 Ky. Law Rep. 523, *L. & N. R. R. Co. v. Mount*, 125 Ky. 593, 101 S. W. 1182, 31 Ky. Law Rep. 210, and *National Casket Co. v. Power*, 137 Ky. 156, 125 S. W. 279, are to the same effect. From these repeated adjudications the rule would seem to be firmly established in this jurisdiction that punitive damages are recoverable only where the defendant has acted wantonly, or recklessly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.

The facts of this case do not bring it within the rule; and for that reason alone the judgment is reversed, and a new trial ordered.

HAMMERS v. COLORADO SOUTHERN, N. O. & P. R. Co.

(Supreme Court of Louisiana, March 27, 1911. Rehearing Denied May 8, 1911.)

[65 So. Rep. 4.]

Railroads—Injuries on Track—Contributory Negligence.—One who sat on the rail against the wheel of one of a string of freight cars on a switch, while waiting for a passenger train to arrive, to meet a passenger, was negligent, so as to bar recovery for injuries by an engine backing the car against him.

Negligence—Last Clear Chance Doctrine.*—One who is himself negligent may recover for personal injuries, if defendant, after knowing of the danger, could have avoided the injury by exercising ordinary care, but failed to do so; the negligence of the injured person not being the proximate cause of the injury in such case.

Railroads—Injuries—Contributory Negligence—Last Clear Chance Doctrine.*—Plaintiff's negligence in sitting on the rail against the wheel of a freight car on a switch, in order to be in the shade while waiting for a passenger train, was concurrent with any negligence of the company in backing an engine against the cars without warning, and continued down to the very moment of the accident, so as to prevent the application of the last clear chance doctrine; it not being applicable where the negligence of plaintiff and defendant are concurrent, and each continues to the very moment of the accident.

Railroads—Injuries on Track—Injuries on Switches—Negligence.—The exercise of due care does not require trainmen to look under stationary freight cars on a switch before moving them, to ascertain whether some one is sitting on the rails.

Railroads—Crossing Accidents—Negligence.†—A railroad company is not bound to station a flagman at the crossing of a switch over a street in a small town.

*For the authorities in this series on the subject of the last clear chance doctrine, see last foot-note of *Edge v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 737, 61 Am. & Eng. R. Cas., N. S., 737; last foot-note of *Louisville, etc., R. Co. v. Trisler* (Ky.), 38 R. R. R. 650, 61 Am. & Eng. R. Cas., N. S., 650; last foot-note of *Welsh v. Tri-City Ry. Co.* (Iowa), 37 R. R. R. 398, 60 Am. & Eng. R. Cas., N. S., 398; last foot-note of *Belle Alliance Co. v. Texas, etc., Ry. Co.* (La.), 37 R. R. R. 43, 60 Am. & Eng. R. Cas., N. S., 43; first foot-note of *Denver City Tramway Co. v. Wright* (Colo.), 36 R. R. R. 360, 59 Am. & Eng. R. Cas., N. S., 360.

For the authorities in this series on the subject of concurrent negligence, see last foot-note of *Doherty v. Boston, etc., St. Ry. Co.* (Mass.), 38 R. R. R. 390, 61 Am. & Eng. R. Cas., N. S., 390; first foot-note of *Chicago, etc., Ry. Co. v. Bennett* (C. C. A.), 38 R. R. R. 671, 61 Am. & Eng. R. Cas., N. S., 671.

†For the authorities in this series on the subject of the duty of railroad to keep flagman at crossings, see *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99.

Hammers v. Colorado Southern, N. O. & P. R. Co

Railroads—Injuries on Track—Actions—Sufficiency of Evidence—Signals.—In an action against a railroad company for injuries to plaintiff while sitting on the rail against a freight car on a switch, by the backing of an engine against the car, evidence held not to show that the bell was not rung as long as the backing train was in motion.

Railroads—Injuries on Track—Sufficiency of Evidence—Negligence.—In an action against a railroad company for injuries to plaintiff while sitting on the rail against a freight car on a switch, by the backing of an engine against the car, evidence held not to show negligence by the company.

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Charles A. O'Neill, Judge.

Action by Charles L. Hammers against the Colorado Southern, New Orleans & Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Judgment set aside, and suit dismissed.

E. D. Saunders and Dufour & Dufour, for appellant.
Lewis & Lewis, for appellee.

PROVOSTY, J. The railroad of the defendant company skirts the eastern side of the town of Eunice, running due north and south, along what on the map is East street. Though it has a regular station, its principal stopping place, where most of the passengers get on and off trains, and where the buses come to meet them, is at Laurel street crossing. Plaintiff went there, just before the arrival of the morning train, to meet a friend expected by the train. The day was warm, and, there being no depot or other shelter provided there by the railroad, the persons who, like plaintiff, had come to await the arrival of the train, of whom there was quite an assemblage, some 40, it is said, sought protection against the hot sun, that was pouring down, wherever they could find it. A line of freight cars, with no locomotive attached, stood there upon the side track, alongside of the main track; the rear end of the hindmost car being on a line, or about on a line, with the property line of Laurel street, or, perhaps, impinging a few feet upon what would have been the sidewalk, if there had been one. To get out of the sun, plaintiff went under this end car, and took a seat upon the rail, just back of the front truck of the car, close enough to the wheel for him to have leaned against it. Two young men accompanied him. One of them took a seat on the end of a cross-tie on the shady side of the car, out of danger from any movement of the cars. The other stretched himself on the grass. So placed and grouped, they were engaged in conversation when a freight train, composed of a locomotive and six cars, that had backed upon the side track, or switch, struck the line of cars, in

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coupling to them, and caused them to move, so that the wheel near which plaintiff was sitting caught his leg and pinched and crushed it so badly, without, however, passing entirely over it, that it had to be amputated near the thigh.

Plaintiff sues in damages, charging negligence on the part of the defendant company, in that no whistle or bell was sounded to give warning of the approach of the locomotive, and in that there was no flagman or other person at the crossing, or at the end of the train, to give notice or warning of the intended back movement of the line of freight cars, and in that the backing train was brought with great and unnecessary force against the stationary cars.

[1] The first feature that strikes the judicial mind in approaching the consideration of the case is the reckless and needless imprudence of plaintiff in placing himself under this car, on the rail, close to the wheel, when he knew that a locomotive might come and move the cars at any moment, and when he might have had a seat just as shady and comfortable, and as convenient for carrying on his conversation, by following the example of his companion and sitting on the end of one of the cross-ties. His learned counsel make the attempt to absolve him of negligence by likening his sitting on this rail in front of this car wheel to the act of one who seeks shelter from the sun under a horseless wagon. The argument is hardly to be taken seriously.

[2] The main reliance of counsel is upon the so-called last clear chance doctrine. That doctrine is formulated in 29 Cyc. 530, as follows:

"While the negligent act or omission of the person injured ordinarily defeats recovery, the rule is subject to the exception or qualification that, although such person has been guilty of negligence in exposing himself to danger, yet he may recover, if defendant, after knowing of such danger, could have avoided the injury by the exercise of ordinary care, and fails to do so, as in such case the negligence of the person injured is not the proximate cause of the injury, and the negligence of defendant becomes the proximate cause. This rule has no application where the negligence of the person injured and of defendant are concurrent, each of which, at the very time when the accident occurs, contributes to it."

[3] In the present case the negligence of defendant in sitting in this place of danger continued down to the moment of the accident. Plaintiff was under no disability whatever. If he continued to sit on this rail, in this perilous place, it was simply because he chose to do so.

Anent the practical operation of this doctrine of last clear chance, we quote further from Cyc., loc. cit., the following:

"The rule has no application where the negligence of the per-

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son injured and of defendant are concurrent, each of which, at the very time when the accident occurs, contributes to it."

[4] We do not think that exercise of due care on the part of a railroad company requires it to look under its stationary cars, before moving them, to ascertain whether somebody is not sitting on one of the rails.

The learned counsel argue the case as if some one at the crossing, or some one using the crossing, or the space round about it, in the legitimate, ordinary way, had been injured. But plaintiff was not at the crossing. He was close to the front truck of the car, and the car was 36 feet long; and he was using neither the crossing nor the space about it in the legitimate, ordinary way. He was in a position where a lookout on the cars could not possibly have discovered him. And, we repeat, it is not the duty of a railroad company, before attempting to move a stationary car on a side track, to look under the car, to ascertain whether somebody may not be under it.

We find that, as a matter of fact, the coupling was made with unusual care, owing to the very fact that the end of the stationary car was close to, or upon the crossing.

The brakeman who adjusted the coupling had gone to parts unknown by the time of the trial, and therefore did not testify in the case. Whether he took the precaution to glance ahead to see that the crossing was clear, before signaling the train to come on for the coupling, the evidence does not show. But it does show that the line of stationary cars moved so little that no one standing on the crossing could have been run over.

[5] The railroad was under no obligation to keep a stationary flagman at this crossing.

We find that the whistle was blown; that it was blown when the train was backing on the Y, about 1,800 feet from where plaintiff was seated on the rail. Whether the bell was rung, or not, is left doubtful. The fireman says that he rang it continuously up to the time the engine stopped; and he is corroborated in that statement by the conductor. The brakeman testified that he was standing on the top of the car next to the engine; that the bell was being rung as the train was backing down the switch to make the coupling; but that he does not remember where it stopped ringing. The engineer says that the bell was being rung while the train was backing down the Y; but that he does not remember whether it continued to ring after they had entered the siding, as, on leaving the Y, he "began to get busy taking signals." A witness who had stood holding his horse and a calf in the ditch alongside of the track, between the Y and the entrance of the siding, testified that the whistle was blown the the bell rung, and that the train was then backing, but whether on the Y or on the siding he could not tell, because

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the sounds frightened his horse, and from that moment his whole attention was centered on holding the animal.

None of the other witnesses heard either whistle or bell. This is not strange as to those who were at some distance, or at work inside of the neighboring buildings; but it is strange as to one man who was sitting outside on the steps of a building facing the track at the crossing, and as to plaintiff and the two young men who were with him, one lying on the grass and the other sitting on the end of a cross-tie.

[6] The number of stationary cars on the siding is variously estimated from 8 to 20, and the locomotive was at the far end of the 6 which it was backing. This would place the locomotive at a considerable distance from the witnesses that did not hear the bell. Be that as it may, we do not find it established that the bell was not rung as long as the backing train was in motion.

[7] We fail to find, therefore, that the railroad was in any respect negligent. So that plaintiff would have to fail in his suit, even apart from his own negligence.

The judgment appealed from is set aside, and the suit is dismissed, at plaintiff's cost.

PANTAGES v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, April 17, 1911.)

[114 Pac. Rep. 1044.]

Evidence—Appeal and Error—Photographs—Identification—Evidence on Former Trial.—On a former trial, a witness identified a picture which purported to be a scene of the wreck. This picture, which was a clipping from a paper, was filed in the Supreme Court with the record on appeal, and after reversal it was stipulated that such testimony at the former trial might be read subject to legal objections, and, on the absence of the picture, plaintiff produced a clipping from a newspaper showing a picture of the wreck and offered it in evidence as similar to the picture identified by the witness. The court stated "that he remembered it was the one on the other trial," and, after an exception to its introduction, charged defendant's counsel with knowing that "it is the same one." Held that, it being conceded that it was not the same clipping, it was inadmissible, and, considering the statements of the court, the ruling was prejudicial.

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Street Railroads—Collision with Automobile—Right to Use Street.*—In an action for injuries in a collision between an automobile and a street car, a request to charge that if the automobile was being operated on the track when it was unnecessary to do so, and when a car might be expected at any moment, and that fact contributed to the injury and was also apparent to plaintiff, then plaintiff was negligent, and could not recover, was properly refused, as a traveler may lawfully use any part of the street he pleases when it is not in the immediate use of another, though there is no other requirement for him so to do than of convenience.

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Alexander Pantages against the Seattle Electric Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

James B. Howe and *Hugh A. Tait*, for appellant.

John E. Ryan and *E. M. Stanton*, for respondent.

FULLERTON, J. The appellant owns and operates a street railway system in the city of Seattle. The respondent owns an automobile, and while being driven therein collided with one of the appellant's cars. The effect was to demolish the automobile and slightly injure the respondent. This action was brought to recover damages for the injury suffered. There was a former trial of the cause in which the respondent recovered a judgment, which, on appeal to this court, was set aside for errors occurring at the trial. *Pantages v. Seattle Electric Co.*, 55 Wash. 453, 104 Pac. 629. After the cause had been remanded, a second trial was had, which also resulted in a verdict and judgment for the respondent. This appeal is from the last-mentioned judgment. The errors assigned will be noticed in their order.

[1] On the first trial at a Mrs. Goss was called as a witness on behalf of the respondent, and, after testifying to having been a witness to the collision, gave a detailed description of the manner of its occurrence as it appeared to her. She further testified that some time after the accident, while she was standing in the doorway of her residence, some one took a photograph of the wrecked automobile. She did not know who took the photograph and never saw it after it was taken, but was shown a newspaper clipping containing a picture of what purported to be a scene of the wreck, and said that it was a reasonably correct representation of the scene as

*See first paragraph of foot-note of *Carroll v. Boston Elev. Ry. (Mass.)*, 36 R. R. R. 401, 59 Am. & Eng. R. Cas., N. S., 401; first foot-note of *Henry v. Seattle Elect. Co. (Wash.)*, 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721.

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she remembered it. On the second trial Mrs. Goss could not be produced as a witness, and counsel stipulated that the testimony she gave on the former trial might be read to the jury from the record of that trial subject to all legal objections. While her testimony was being read, it was discovered that the clipping which the witness identified was not with the record from which the counsel conducting the trial was reading, but was in fact among the files of the appellate court, having been sent there as a part of the record on the former appeal. Counsel thereupon produced a clipping from a newspaper showing a picture of a wrecked automobile and offered it in evidence as being similar to the picture identified by the witness in her testimony given at the former trial. To the offer counsel for the appellant objected, whereupon counsel for the respondent stated that he would supplement the offer by further proof. He then called one E. M. Stanton as a witness, when the following occurred: "Q. By Mr. Ryan, counsel for respondent: You are an attorney at law? A. Yes, sir. Q. I will ask you, Mr. Stanton, to examine this instrument marked 'Plaintiff's Exhibit B for Identification,' and tell the court and jury whether or not you have seen that before. A. I cut this out from the issue of the evening Times of December 4, 1907. Mr. Ryan: I will ask the court to examine this, as the court has in mind the other exhibit. The Court: I remember the other exhibit, and this is simply the same thing that was admitted on the other trial. Mr. Tait (counsel for appellant): There is no proof of that, your honor. The Court: The court says it is so. Mr. Ryan: Let the record show that the exhibit was passed to the court for his examination. The Court: The court says he remembers it was the one on the other trial. Mr. Tait: Now, if your honor please, I desire to reserve an exception to your honor's statement that this is the same photograph that was—or rather cutting from the newspaper that was received on the other trial. The Court: That is all right. You can impeach the court if you want to. You will have that opportunity given you. Mr. Tait: I have not any such idea as that in mind at all. The Court: I know it is the same one. I don't care a snap. Mr. Tait: My objection to its introduction is overruled? The Court: Yes. Mr. Tait: I may be permitted to have an exception? The Court: Yes. Furthermore, you know it is the same one. (Paper received in evidence, and marked 'Plaintiff's Exhibit B.')

The appellant complains not only of the ruling of the judge in admitting the newspaper cut in evidence, but of his conduct and remarks when making the ruling. It has seemed to us that the complaint is just. It is manifest that the newspaper cut was not admissible as evidence in the connection in which it was offered. It was not the cut identified by the witness at the former trial from whose testimony counsel was reading, nor was

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it shown to be a cut taken from the same edition of the newspaper from which the other was taken. Had it been shown to be so taken and an exact duplicate of the cut identified by the witness, no serious objection could have been urged to its admission. But unless it was shown to be the one originally identified by the witness, or an exact duplicate of such original, it could not properly be admitted in evidence. Counsel argue, however, that it was a matter which the court could judicially know, since a court may "assume judicial knowledge of facts which he has learned. * * * at an earlier hearing of the same case." But, conceding that this rule is applicable to an instance of this kind, it cannot be said that the judge presiding at this trial learned at the first trial that this particular cut was a duplicate of the one there identified by the witness. That question did not arise at the first trial. No duplicate of the document identified by the witness was sought to be introduced. That question arose for the first time on the last trial, and no opportunity had been afforded the court to know judicially that the one newspaper cut was a duplicate of the other. Moreover, although the judge may have meant otherwise, he did not identify the instrument as a duplicate of the original introduced at the other trial. He stated that: It was "the one on the other trial." "I know it is the same one." "Furthermore, you [addressing counsel] know it is the same one." That it was not the same one is now confessed on all sides.

Counsel argue further, however, that the wrongful admission of the picture in evidence is so far immaterial that it ought not to be regarded as reversible error, since there is nothing tending to show directly that the appellant's case was prejudiced thereby.

Were the erroneous admission of the instrument alone in question, we would be inclined to accept this view, as the cause has been twice tried to a jury with practically the same result; but we cannot overlook the comments of the court when making the ruling complained of. We fear these remarks made the error prejudicial by bringing the question at issue into too great prominence. The record not only shows that the judge manifested a feeling seemingly uncalled for by the very mild protests made by counsel, but went further and accused counsel of bad faith, when counsel was entirely right in his contention and the judge wholly in error. This we think was so far prejudicial as to require a new trial.

[2] Of the instructions requested by the appellant, the only one necessary to be specially noticed is the following: "You are further instructed that if you find that the automobile, prior to the accident, was being operated upon the track upon which defendant's car was being operated as a time when it was unnecessary so to do, and at a time when a car coming in the opposite direction might be expected at any moment, and you further find

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that the fact that the automobile was being operated upon such track contributed to the injury, without which the same would not have happened, and was also open and apparent to the plaintiff, then you are instructed that the plaintiff was guilty of such contributory negligence as to bar his recovery, and your verdict must be for the defendant." We think the refusal to give the instruction was error. To announce the rule therein defined as law would be to hold that nothing but necessity would justify the use of that part of a street covered by street car tracks while the line was being operated. This is not the rule. A traveler on a public street may lawfully use any part of the street he pleases when the same is not in the immediate use of another, even though there is no other requirement for him so to do than that of convenience. He must realize, of course, that in so far as street cars are concerned they can travel over only a given space, and that he must avoid this space on the approach of a car. But his right to use any part of the street when not in use by a car is not to be governed by the question of necessity.

For the error mentioned, the judgment is reversed, and a new trial awarded.

DUNBAR, C. J., and MOUNT, PARKER, and GOSE, JJ., concur.

FELSKE v. DETROIT UNITED RY.

(Supreme Court of Michigan, March 31, 1911.)

[130 N. W. Rep. 676.]

Street—Railroads — Operation—Derailment—Negligence.*—Where plaintiff, a traveler in the street, was struck by the swinging around of one of defendant's street cars, due to derailment of the rear trucks, held, that the derailment alone was insufficient to establish a prima facie case of negligence.

Street Railroads—Evidence—Precautions Taken after Accident.†—In an action for injuries to a traveler by the derailment of a street car at a crossover, evidence that a switchman was stationed at the crossover after the accident was inadmissible.

Damages—Personal Injuries—Evidence—Habits of Industry and Sobriety.—In an action for injuries, evidence of plaintiff's habits of industry and sobriety, etc., is admissible as affecting the amount of damages.

*See second foot-note of *Cahill v. Illinois Cent. R. Co.* (Iowa), 36 R. R. R. 618, 59 Am. & Eng. R. Cas., N. S., 618; first foot-note of *American Ice Co. v. Pennsylvania R. Co.* (Pa.), 33 R. R. R. 535, 56 Am. & Eng. R. Cas., N. S., 535; second foot-note of *Southern Ry. Co. v. Stewart* (Ala.), 28 R. R. R. 606, 51 Am. & Eng. R. Cas., N. S., 606.

†See foot-note of *Matteson v. New York, etc., R. Co.* (Pa.), 26 R. R. R. 751, 49 Am. & Eng. R. Cas., N. S., 751.

Felske v. Detroit United Ry

Error to Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by Albert Felske against the Detroit United Railway. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Argued before OSTRANDER, C. J., and MCALVAY, BROOKE, BLAIR, and STONE, JJ.

Brennan, Donnelly & Van De Mark, for appellant.

Sloman & Sloman (Wm. S. Sayres, Jr., of counsel), for appellee.

BLAIR, J. Plaintiff brought this action to recover damages for injuries caused by the derailment of the rear trucks of one of defendant's suburban cars and the consequent swinging of the car across the street, thereby colliding with the vehicle in which he was riding.

At the place where the accident happened the defendant maintains a double-track street railway. On the day that the accident occurred the plaintiff and two or three other persons were riding in a light wagon. They were proceeding in a westerly direction on Gratiot avenue, on the north side of the street, and driving about midway between the car tracks and the curb. The collision occurred between the intersection of Holcomb and Rohms avenues with Gratiot avenue. Commencing about a block and a half west of this point and extending some distance westward, the south track of the defendant company had been torn up for the purpose of replacement and repair. A temporary track had been constructed upon the south side of the street, in the traveled portion thereof near the curb, for use while the repairs and reconstruction mentioned above were being made. Cars proceeding in an easterly direction—that is, out Gratiot avenue—would therefore travel for some distance upon this temporary track, but when they came to a point about a block and a half away from where the accident happened they would, by means of a crossover, pass over to that part of the permanent track which had not yet been taken up, and along this track to where the collision took place. On the occasion of the accident, a large suburban double-track car, which was bound for Mt. Clemens—that is to say, in an easterly direction—while passing from the temporary track onto the permanent track, failed for some reason to properly take the rails, although this fact was not known to anybody at the time. The front truck took the rails in the proper manner, but the rear truck did not. After the car passed from the temporary track to the permanent track, the power was applied to the car, and it speeded up to about the usual traveling speed and proceeded at this rate for about a block or a block and a half, when the rear truck suddenly slewed off to the left, leaving the track.

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The court submitted the case to the jury upon the following theory: "Now I say to you from the fact that the car did leave the track at the junction between this temporary track and the main track, and from the fact that it was propelled along at I know not what rate—its initial rate when it left the temporary track, but at a considerable rate, though not an unlawful rate, had it been on the track at the time of the collision—I say from that fact you may infer negligence on the part of the company. * * * From the circumstance that the evidence is before us which authorizes you to find that the car left the track at the point I have described, and proceeded at a considerable rate until the time of the accident, and that the accident took place at least a block—a good city block in distance therefrom—I say from these facts, gentlemen of the jury, I think you may infer negligence on the part of the defendant, and not from any other testimony which has been offered in this case. If there is a liability, it comes, gentlemen of the jury, from the fact that the company ought to have discovered the condition of the car after it had gone over, and have stopped that car before the accident occurred."

Defendant brings the record to this court for review, grouping his assignments of error in the brief as follows: "(1) There is no testimony in the case to support any finding of negligence on the part of the defendant, and the charge of the court in regard thereto was erroneous. (2) It was error for the court to permit testimony that after the accident the defendant had a watchman stationed at the crossover. (3) It was error for the court to permit testimony as to personal habits and character of the plaintiff. (4) There was error justifying the reversal of the judgment in the argument of plaintiff's counsel."

1. The temporary track, as testified by plaintiff's witnesses, "was on top of the pavement, about six inches or eight inches above the regular track. * * * I did not inspect what they used as a crossover from the temporary to the permanent track, the same as they usually do. I have seen it so often at night on Gratiot avenue; the crossing there is a part of the rails laid right on top of the others. The track was substantial so far as that is concerned; it was not laid right on the pavement. There were wood ties in between, and then filled in with dirt and gravel. * * * They had a crossover where they used to come from one track to the other. They had one track there and dropped from one to the other. It was a temporary track, I should think. I do not remember how that track was laid. * * * Q. Do you know anything about the connection between the temporary track and the permanent track? A. No; there was only a rail on top of the other where they dropped off, and that it the way them trucks dropped off; the way I could see by the mark on the pavement." The crossover rail on top of

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the permanent rail tapered, as we understand, to the level of the permanent rail.

Plaintiff's witness Watson testified: "I examined the pavement and could see that it came off the track right where they were repairing it. I saw on the pavement the mark where it was running; the flange of the wheels cutting it right alongside the track. This groove in the pavement extended from where they were repairing the track up to just this side of my house, where it jumped the track altogether; that is, the hind trucks. This is a distance of a block, of course; that is a very large block from Holcomb avenue to Belvidere—a very large block on that side of the street. The groove in the pavement which I saw was on the inside of the south rail, between the rails. * * * This small groove in the pavement was between the rails of the south track, and was on the north side of the south rail of the south track. The mark on the pavement that I saw was a small groove in the cedar blocks, just nicking the edge of the blocks. I did not see any marks near the other rails, not until it left the track entirely. This mark that I saw near the right-hand rail of the south track was quite a heavy mark. It had sort of nicked the edges of the blocks near the rail. It was between the rail and the blocks. It kept right alongside of the rail. * * * When the car passed my house, it was going at a pretty fair speed, 10 or 15 miles an hour. Of course, I could not tell exactly. I could not tell whether it was off the track or not by looking at the car, and did not know that before the accident. * * * You see, that is how it ran so smooth. The hind trucks were off the track. The front trucks never were off, not even at the accident. I was about halfway between this crossover and the place where the accident happened. When this car passed me, there was nothing at all about it which attracted my attention. * * *

Q. There was nothing unusual about the way the car went by, was there? A. Nothing at all. Q. So that you did not have any occasion to watch it, did you? A. No, I did not have any occasion to watch the car. The first I knew of there being an accident, I saw the car swing around. I happened to be looking in that direction."

There was no testimony that the temporary track, the crossover, or the junction with the permanent track were improperly constructed, or that the car was operated over them at an excessive rate of speed, or in any wise negligently; neither was there any testimony that there was any defect in the car, or any lack of skill of competency on the part of the operators; and, unless upon the ground suggested by the circuit judge, there was no evidence upon which to support an inference of negligence, except the derailment of the car, which does not, in the absence of other facts and circumstances tending to show negligence, make a *prima facie* case. *Peppett v. M. C. R. R.*, 119

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Mich. 640, 78 N. W. 900; *Sewell v. D. U. R.*, 158 Mich. 407, 123 N. W. 2; *Niedzinski v. Traction Co.*, 160 Mich. 517, 125 N. W. 409.

We are also of the opinion that there was no evidence to support the theory upon which the case was submitted. The rails of the permanent track were of the grooved type. The fact that only flange mark was found, just nicking the edges of the cedar blocks immediately north of the south rail until the rear trucks swung entirely clear of the track, indicates, in the absence of any evidence, that the rails had spread; that while the flanges of the south wheels of the truck had come out of the groove the treads of the wheels were riding on the north side of the groove, and the flanges of the north wheels were riding upon the top of the north rails. This probably explains, in the language of Watson, "how it ran so smooth." The testimony of plaintiff's witness Watson, which is the only testimony on the subject, does not support, but tends to negative, an inference that the running of the car was so unusual that it ought to have attracted the attention of the car men. A verdict based upon this theory would not be supported by any legitimate inference from the facts and circumstances disclosed by the testimony, but would be the result of mere conjecture.

2. The testimony that a watchman was stationed at the cross-over after the accident should not have been received. *Moon v. Railroad Co.*, 143 Mich. 125, 160 N. W. 715, 108 N. W. 78.

3. Testimony as to the plaintiff's habits of industry, sobriety, etc., was admissible as affecting the amount of the damages suffered. *Shall v. Railroad Co.*, 152 Mich. 463, 116 N. W. 432.

The other questions discussed in the briefs will probably not arise upon another trial, if one should be had, and we therefore do not consider them.

The judgment is reversed, and a new trial granted.

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(Supreme Court of Pennsylvania, Jan. 3, 1911.)

[79 Atl. Rep. 122.]

Street Railroads—Injuries to Person on Track—Evidence.—In an action for death of plaintiff's husband killed on the track of a street car company, evidence held to sustain verdict for plaintiff.

Negligence—Contributory Negligence—Dangerous Situation.*—Where a person finds himself in a dangerous position by the negli-

*See last foot-note of *Stack v. East St. Louis, etc., Ry. Co.* (Ill.), 37 R. R. R. 410, 60 Am. & Eng. R. Cas., N. S., 410; second foot-note of *Steverman v. Boston Elev. R. Co.* (Mass.), 36 R. R. R. 736, 59 Am. & Eng. R. Cas., N. S., 736.

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gence of another without his own fault, and in attempting to extricate himself, not having time to deliberate, selects a more dangerous method, the law will not impute to him contributory negligence.

Appeal from Court of Common Pleas, Beaver County.

Action by Matilda Shaffer against the Beaver Valley Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the opinion of Holt, P. J., overruling motion for judgment non obstante veredicto:

"In this case the plaintiff averred negligence on the part of the defendant company in making an excavation in Third avenue, in the borough of Freedom, for the purpose of laying a second track, and not properly barricading and putting up signals on it to protect the public from injury while using said street, and that the plaintiff's husband, who was not acquainted with the said street, was passing along the same, on the night of October 27, 1906, and while exercising due care, by reason of the absence of sufficient barricades and proper signals to give him warning of the danger, and while endeavoring to extricate himself from a perilous position, and without fault or negligence on his part, was struck by one of the cars operated by the defendant. For some time prior to the accident the defendant was engaged in constructing a second track in the borough of Freedom for its street railway. The track in operation at that time was on the southerly side of Third avenue at the point in question. The space lying between the said track and the curb on the northerly side of the said highway was paved with fire bricks, and was ordinarily used by the public. For the purpose of laying the second track, the bricks between the easterly rail of the said track and a point about seven feet from the northerly curb line on said street were taken up, and an excavation made some nineteen inches in depth for the full width thereof, leaving about seven feet of space between the edge of the excavation and the curb on the eastwardly side of said highway.

"On the night in question, the plaintiff's husband, and one John J. Graham, came from a point in Allegheny county with a one-horse wagon load of moving, and reached the southerly end of the said excavation after dark. During the time said work was in progress, the public travel had been directed upon the existing street car track. The track laid upon said street was so close to the southerly side of said highway that there was no room to drive between the poles on the south side of said street and the said track. Part of the earth that had been taken from said excavation was thrown to the southerly side of the existing track in heaps, and at a few places along the line of the said track passing places for vehicles were made between the property line south of the said existing track. The

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said excavation extended in under the ends of the ties of the track that was already upon the highway. The space lying between the easterly curb line and the edge of the said excavation was used by persons in the employ of the defendant in hauling the earth taken from the said excavation, so that there appeared to be a beaten track near the southerly end of the said excavation, leading from the said seven-foot space of pavement to the track of the defendant company. When the plaintiff's husband and the said John J. Graham approached the southerly end of the said excavation, according to the testimony offered in behalf of the plaintiff, they saw the excavation, the earth that had been taken therefrom and piled southwardly of the said track, a red lantern resting on a tie near the said track, and a barricade immediately opposite the end of the said excavation, and that there was no barricade to the entrance upon the seven-foot strip of paved street lying next to the northerly curb line. They also noticed what appeared to be a definite or defined way leading across from the existing track to the said paved space next to the northerly curb line, and, believing that the seven-foot space of pavement to the right was intended as the proper driveway for persons proceeding northwardly on said highway, the husband of the plaintiff and the said Graham entered upon the said piece of pavement, the plaintiff's husband getting down into the excavation for the purpose of observing whether or not the wheels of the wagon would come too close to the edge, so as to warn Graham, who led the horse on the paved part of the street. After proceeding about 100 feet along the street, they came to a trolley pole, or pole of some kind, that was placed some inches beyond the curb line in the street, which necessitated Graham leading the horse closer to the excavation, in order to pass the said pole, and, as he did so, the hind wheel of the wagon caused the pavement to cave in, and the wheel to go over into the excavation. Some bricks were placed under the wheel, and in front of it, in an effort to bring the wheel back to the part of the paved street; the husband of the plaintiff remaining in the excavated part of the street to see whether or not the wheel would properly mount the brick. When Shaffer started the horse, the wagon with the load of moving upset, and just as the wagon was falling over one of the cars of the defendant went past, and stopped a short distance therefrom. Graham was under the impression that Samuel Shaffer, the plaintiff's husband, was under the load of moving, and called to those in charge of the car to render him assistance to get him out. It was found, however, that Shaffer was under the front truck of the defendant's car, and when he was taken out he was dead. The plaintiff's theory of the accident is that Samuel Shaffer in an effort to escape injury from the falling wagon and the load of moving sprang suddenly up on the street car track, just as

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the car was approaching, and that he was run down and killed by it. There is no evidence to show how Shaffer got on the track. The motorman testified that just as he was passing the wagon he noticed something falling towards the car.

"The defendant's evidence tended to prove that the whole of the said street, except the part occupied by the street car track, had been securely barricaded, and red lights placed on such barricade early in the evening of the day of the accident, and that such other precautions were taken as to properly warn the traveling public as to the dangerous condition of the said highway. The defendant also takes the position that the plaintiff's husband was guilty of contributory negligence in placing himself in the position in which he was immediately preceding the falling of the wagon and the load of moving, and in entering upon the part of the said highway lying between the track and the curb on the northerly side of the said street. On the question of contributory negligence this is a very close case. We are not satisfied, however, that contributory negligence was conclusively proven. We think that it was a question for the consideration of the jury. As to the question of barricades and lights, there is no doubt in the mind of the court about the sufficiency of the evidence to carry the case to the jury. It was clearly the province of the jury to determine whether or not the plaintiff's husband was guilty of contributory negligence in entering upon that part of the highway between the defendant's track and the curb on the easterly side of the street. The main difficulty arises as to the alleged negligence of Samuel Shaffer after the wheels of the wagon slipped over the edge of the embankment into the excavation. It was for the jury to determine whether or not the defendant by its negligence put the plaintiff's husband in a perilous position, or in the position in which Shaffer and Graham were at the time. If it did, it seems to us that it was also for the jury to decide whether or not Shaffer did what a reasonably prudent and cautious person would have done in the circumstances, or failed to do something in the circumstances which such a person would not have failed to do. Did Shaffer, in an instinctive effort to protect himself from the falling wagon and load of moving, and without fault on his part, make an error of judgment, and spring suddenly upon the track of the defendant, and receive the injury which caused his death? This was, we think, a matter peculiarly within the province of the jury to determine.

"Where a man finds himself suddenly placed in a dangerous position by the negligence of another, without his fault, and in order to extricate himself from such danger, not having time to deliberate and judge the best way of so doing, happens to select a method of doing so which was not the best, and which, if he had time to consider, he might not have taken, the law

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would not impute to him contributory negligence so readily as if he had time to choose with judgment. All that it requires of him is to do as a prudent man would do under the circumstances. *Kreider v. Lancaster, Elizabethtown & Middletown Turnpike Co.*, 162 Pa. 537; 29 Atl. 721." ~

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

D. A. Nelson, for appellant.

J. Sharp Wilson, Thomas M. Marshall, and Rody P. Marshall, for appellee.

PER CURIAM. The judgment is affirmed for the reasons stated in the opinion of the learned judge of the common pleas in discharging the rule for a new trial.

KINDELLAN v. MT. WASHINGTON RY. CO.

(Supreme Court of New Hampshire, Coos, Feb. 7, 1911.)

[79 Atl. Rep. 691.]

Master and Servant—Injuries to Servant—Negligence of Master.—Where an employee was fully informed as to the dangers of using a certain appliance in his work, the employer was not negligent in permitting him to use it.

Master and Servant—Injuries—Negligence.—Plaintiff, a section hand, was working on top of a mountain up which a railroad ran, and was injured while sliding down the mountain from work in the evening on a slide board, by another employee running into him from behind on a similar board. All the men who used slide boards to descend had been instructed in their use and were familiar with the dangers attending their use, knew the necessity of keeping a reasonable distance apart, and going slowly, and were familiar with the route, plaintiff having used the board about 25 times, and the employee, who ran into him, about 20 times, before the accident. There had been three or four collisions in using slide boards within the past 20 years. Held that, since plaintiff was familiar with the dangers attending the use of slide boards, the company was not negligent in permitting them to be used by employees so as to be liable for plaintiff's injuries.

Master and Servant—Injuries—Proximate Cause—Incompetency of Foreman.—Where plaintiff's foreman told another section employee not to go down the mountain on which they worked on a slide board, but such employee disobeyed his orders and did go,

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running into and injuring plaintiff, who had gone ahead of him, on a slide board, no incompetency of the foreman could have contributed to plaintiff's injuries.

Master and Servant—Injuries—Action—Sufficiency of Evidence.—

In an action against a railroad company for injuries to a section hand while riding down the mountain grade on a slide board attached to the track by being run into by another section hand on a board, evidence held not to sustain a finding that it was the other employee's custom to descend the mountain on the train on wet nights.

Master and Servant—Injuries—Action—Sufficiency of Evidence—

Assumption of Risk.*—In a section hand's action for injuries sustained while riding down a mountain on a slide board fixed to the track by being run into by another employee riding on a slide board, evidence held to show that plaintiff knew and appreciated the danger, so as to have assumed the risk.

Carriers—Passengers—Existence of Relation.—Plaintiff was employed as a section hand; the crew working on the top of a mountain in the daytime and descending in the evening after the day's work was done. While the men sometimes descended on a train, they were also furnished slide boards, which were attached to the rails, and on which they descended by gravity. Held, that plaintiff was not a passenger in descending on a slide board; his ride down the mountain being a mere incident to his employment.

Transferred from Superior Court, Coos County; Chamberlain, Judge.

Action by Michael I. Kindellan against the Mt. Washington Railway Company. Verdict for plaintiff, and case transferred from the Superior Court on exceptions by both parties. Verdict set aside, and judgment rendered for defendants.

The defendants' motions for a nonsuit and the direction of a verdict in their favor were denied, and they excepted. The court instructed the jury that the plaintiff was not a passenger upon the defendants' railroad at the time of his injury, and that the count in the declaration charging them as common carriers of passengers need not be considered. To this instruction the plaintiff excepted.

Remick & Hollis, for plaintiff.

Drew, Shurtleff & Morris, for defendants.

BINGHAM, J. This action is brought to recover damages for an injury which the plaintiff received while in the defendants'

*For the authorities in this series on the question whether a railroad employee assumes the risks from dangerous conditions because he had knowledge of their existence and location, see last foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493.

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employment as a section hand and general helper on the Mt. Washington Railway. The principal questions arise on the defendants' motions for a nonsuit and a verdict. At the time the plaintiff received his injury, he was riding on a slide board over the defendants' railway from the summit to the base of Mt. Washington, and was run into by a fellow employee who was following him on a slide board. The plaintiff's contentions are that the defendants were negligent (1) in permitting the sectionmen to use slide boards at all, and (2) in putting the foreman, who he says was incompetent, in charge of the men if they were to use slide boards; and that he himself was in the exercise of due care and did not assume the risk of being injured.

[1] In *Leazotte v. Railroad*, 70 N. H. 5, 6, 45 Atl. 1084, 1085, it is said: "A servant assumes the risk arising from all the ordinary dangers of his employment, of which he either knows or might have known by the exercise of due care; and this includes any risk arising from the negligent performance of the master's duties, if the servant knows of this danger and voluntarily remains in the master's employment." In more recent cases this statement of the rule has been modified somewhat; the view being that if the servant knows and appreciates the dangers to be encountered in the conduct of the master's business, arising from the nature or condition of the instrumentalities or the methods employed, as to him it is not negligent for the master to make use of such instrumentalities or methods; that the master owes the servant no duty as to dangers of which he is fully informed, and may perform his duty to the servant as to dangers of which he is ignorant either by fully informing him of them, or by perfecting or dispensing with the instrumentalities or methods from which the dangers arise. *Bouthet v. Company*, 75 N. H. 581, 78 Atl. 650; *Cooley v. Company*, 75 N. H. 529, 77 Atl. 936; *Manley v. Railway*, 75 N. H. 465, 75 Atl. 81; *Willis v. Company*, 75 N. H. 453, 75 Atl. 877; *Deschene v. Company*, 75 N. H. 363, 74 Atl. 1050; *Kel-land v. Company*, 75 N. H. 168, 71 Atl. 947; *Bennett v. Company*, 74 N. H. 400, 68 Atl. 460. It matters little which is the correct statement of the legal principle—whether it is based on assumption of risk or absence of duty—for the result is the same in either event. If, then, the jury were not warranted in finding that the plaintiff was not fully informed as to the dangers pertaining to the use of slide boards, the defendants were not guilty of a breach of duty, as respects him, in permitting them to be used.

[2] It appears that the plaintiff entered the defendants' employment early in May, 1908, and on July 17th, when the accident occurred, had worked for them about 10 weeks. The first week he was employed in unloading wood at the base of the mountain. From that time on he worked at various points on

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the railways; the last of his work being at the summit, rebuilding the tracks that were destroyed when the Tiptop House was burned and removing the débris caused by the fire in the destruction of the building. Throughout his employment he and the other members of the crew boarded at the base of the mountain. Their labors began at 7 o'clock in the morning and ended at 6 o'clock at night. They left the base on the work train at 7 o'clock in the morning to go up the mountain, taking their dinners with them. This train was made up of a flat car and an engine. The passenger trains began to run June 29th. Down to that time the work train remained on the mountain until a quarter of 5 in the afternoon, when it returned to the base.

About a week before June 29th the foreman instructed the men to get out the slide boards to practice on, as they would have to use them when the passenger trains came on. Before this they had gone down the mountain at night on the work train. The crew then consisted of John Camden, Joe Meaney, Patrick Maloney, Steve Meaney, Kindellan, and one or two others. All of the men, except Steve Meaney, procured slide boards and came down on them that week ahead of the work train. After that they left the summit as a rule at half past 5. Steve Meaney came down on a slide board two or three times before June 29th. On that day two or three of the men left the track crew and worked as engineers or firemen on the trains. Thereafter Steve Meaney had a slide board on which he regularly made the descent with the other members of the crew, with the exception of two wet or foggy nights, when, as he expressed it, he was "new on the board" and came down on the train. It took an hour and 15 minutes for the work train to make the trip down. The men came down on the boards in half an hour, and, as they usually left the summit at half past 5, they passed the work train at the water tank, part way down the mountain. The distance from summit to base was $3\frac{1}{4}$ miles. In using the boards the men were instructed to go slowly, to keep a good distance apart, to stop at the long trestle above Jacob's Ladder and tighten the bolts on the boards, which increased the pressure of the brakes, and to consume half an hour in making the trip. All of the witnesses testified that if a man had been down on a board from one to three times he would be qualified and could make the descent safely if he observed the rules.

The plaintiff testified that he could make the trip safely in 6 minutes, but that he could do it more easily and with a greater degree of safety in 12 minutes. It was more dangerous to go on a board on a wet, foggy night, as the rail would be slippery, and greater pressure would be required on the brakes to regulate the speed, and it would be more difficult to see where one was. All the men had used the boards on foggy nights, some perhaps not as much as others, prior to the accident. The plain-

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tiff had used them about 25 times in all in making the descent, and Steve Meaney about 20 times. Both had been instructed how to manage a slide board, they had discussed with other members of the crew the dangers attendant upon making the trip, they knew the necessity of keeping a reasonable distance apart and of going slowly, and they knew the danger, in case one lost control of his board, of running into the man ahead of him and of being run into by one coming from behind. They had been over the road twice a day for nine weeks, and knew the nature of the grades and where they were the steepest. They had worked with each other and with all the men in the crew, except Sheehy, from the day they entered the defendants' employment in May. They had been down the mountain repeatedly on slide boards in company with the other men, knew how they ran their boards and whether they complied with the rules and instructions that had been given them, and knew the increased danger of their use on wet, foggy nights.

But, notwithstanding all this, counsel for the plaintiff contend that, inasmuch as there was evidence that during a period of 20 years or more three or four accidents had occurred through slide boards coming in collision, and for a time at least their use was forbidden, the jury were warranted in finding that the plaintiff did not know the dangers and assume the risks attending their use. However, we are unable to see that a knowledge of the facts disclosed by this evidence would have been of any aid to him, for he already knew all the facts concerning the use of slide boards necessary to his appreciation of the risk; and in our opinion the evidence does not warrant a finding that the defendants were guilty of a breach of duty to the plaintiff because they permitted slide boards to be used.

[3] Was the plaintiff injured through any fault or neglect of the foreman for which the defendants were responsible? Counsel for the plaintiff take the position that on the night of the accident the foreman, in the presence of the plaintiff, ordered Steve Meaney and Sheehy to go down on the train, and that the plaintiff would not have gone on a slide board if he had known that Meaney was to go on one; that the foreman was an incompetent man; and that if he was given charge of the men the defendants ought to have known that his orders would not be obeyed.

The evidence relating to this branch of the case was that on the afternoon of the accident it had rained so that the men did not work. The plaintiff testified that at about a quarter past 4 the foreman came into the stagehouse, where he and Steve Meaney and two or three members of the crew were, and said, "Take your boards and go ahead of the train to-night;" that they started in the direction of the train to get their boards, and, when they reached the platform beside the track, other members

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of the crew, including Sheehy, joined them. While they were all together, the foreman told Sheehy and Steve Meaney "not to go on the boards, to go on the train," and, turning to the other fellows, said: "You better not go too close; if you do, you will kill each other. Keep apart. The track has been greased, and it is rainy, and you will kill each other." Having said this, the foreman turned and went to the Tiptop House. There was a heavy fog upon the mountain, so that at times one could not see more than 10 feet. Then, again, it would shift, and you might see 50 or 150 feet. The plaintiff's board was beside the track, a little below the engine. He procured it and attached it to the center rail. As he did this, he did not see any of the other men. He knew some of them had gone ahead of him, but did not know who. He started off without further ascertaining what the rest of the men were to do. Steve Meaney followed later, and, having let this board go too fast on the long trestle, he ran into the plaintiff on Jacob's Ladder, threw him off, and injured him. The plaintiff testified that he really believed the foreman thought Meaney would obey him; that he had never known him to disobey any strict orders, and although the men had disobeyed the foreman as to some small things, as he had probably done himself, they would not do so before him.

Now, if the foreman gave this order to Meaney, as the plaintiff testified, we are at a loss to see how his incompetency, if he was incompetent, could be found to have in any way contributed to cause the plaintiff's injury. The order was an entirely proper one, and, if obeyed, the accident would not have happened. There was no evidence that Horne, the defendant's superintendent, ever knew that the men disobeyed the foreman's orders; and the evidence would not justify a conclusion that he ought to have known of it.

Counsel also contend that if the order to Meaney not to go on a board, but to go on the train, was not given, the plaintiff had no reason to think that Meaney would go on a board that night, as it was wet and foggy; that it had not been customary for him to go on a board on such a night; and therefore the plaintiff could not be held to have assumed the risk of being injured by him in case the defendants permitted him to go. The order "not to go down on the boards," etc., was either given or not given. We have discussed its bearing in case it was given. We will now discuss the evidence on the basis that it was not given. If it was not given, then the question is: Was there evidence from which it could be found that the plaintiff had reason to believe that Meaney was not to go on a board that night?

[4] The plaintiff says it was not Meaney's custom to go on a board on wet or foggy nights. The only evidence as to this was that when Meaney was a new man—that is, when he first began using a board—there were two nights when it was wet and foggy

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that he went down on the train, and one other such night when he went on a board. But we do not think this would warrant the jury in finding that it was his custom to go on the train on such nights, and that the plaintiff would be justified in assuming that he would not go on a board. The train was on the mountain the night of the accident. The plaintiff justifies his own conduct in coming down on a board instead of on the train, upon the ground that he was ordered by the foreman to go on a board ahead of the train. This order is the one the foreman gave at the stagehouse, when he came in there to notify the men to get ready to go down the mountain. It will be recalled that this order was given to all the men in the stagehouse, and that Steve Meaney was there and heard the order the same as all the rest. The plaintiff himself so testified. Meaney also testified that the boss came in and "told us we better go down ahead of the train." Now, if the plaintiff had reason to believe that he was ordered by the foreman to go on a board, he had just as much reason for believing that Meaney, to whom the order was given as well as to himself, would go on a board; and, as he had never known him to disobey strict orders, that he would not in this case.

The evidence also discloses that the plaintiff knew as much or more than the foreman did about Meaney's capacity to manage a slide board. He had worked with him every day from the first of the season to the day of the accident. He had been down the mountain on slide boards with him, sometimes starting just ahead, then again just behind him. He knew the increased danger because of fog and rain, and testified that he and the rest of the men were warned this very night by the foreman that the track had been greased, that it was rainy, and that if they went down that night and went too close they would kill each other.

[5] The only reasonable conclusion fairminded men could draw from the evidence was that the plaintiff knew and appreciated the danger and assumed the risk.

[6] The plaintiff was not a passenger. His trip down the mountain was a mere incident of his employment. *Gillshannon v. Railroad*, 10 Cush. (Mass.) 228; *Dickinson v. Railway*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284; *Kilduff v. Railway*, 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873; 6 Cyc. 543.

The order is: Verdict set aside; judgment for the defendants. All concurred.

POUNDS v. CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Minnesota, May 12, 1911.)

[131 N. W. Rep. 329.]

Master and Servant—Injuries to Servant—Defective Machinery—Proximate Cause.—The evidence sustains the verdict that defendant was negligent, that its negligence was the proximate cause of the injury, and that plaintiff was not guilty of contributory negligence, and did not assume the risk.

Master and Servant—Injuries to Servant—Contributory Negligence.*—It is not negligence per se for a brakeman to violate a rule of the company forbidding employees to ride on the pilots of engines, when defendant's negligence creates an emergency, and renders disobedience of the rule necessary to the discharge of the brakeman's duties.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Hascall R. Brill, Judge.

Action by Andrew Pounds against the Chicago Great Western Railway Company. Verdict for plaintiff, and defendant appeals from an order denying its motion for judgment notwithstanding the verdict or for a new trial. Affirmed.

Briggs, Thygeson, Loomis & Everall, for appellant.

Samuel A. Anderson for respondent.

BUNN, J. Plaintiff was a freight brakeman on the railroad now owned by defendant, but then operated by receivers. He was an experienced brakeman, 34 years old at the time of the accident. On July 6, 1908, at about 10 o'clock a. m., the freight train, on which plaintiff was working, composed of an engine and some 30 cars reached Norwood, Iowa. Part of the cars were to be cut out of the train and switched to mines. They were cut out by means of a flying switch, which left the cars on the main line about 100 feet east of the switch, with the engine on the switch track. Plaintiff had thrown the switch to make the cut, and remained there until the cars ran out on the main line. The next operation was for the engine to couple to the cars and push them to the mines. It was plaintiff's duty to make the coupling.

He testified that as the rear car passed the switch he ran behind it and attempted to open the knuckle on the automatic coupler, but was unable to do so. In making an automatic coupling, it is not necessary to have the knuckles on both couplers.

*For the authorities in this series on the subject of contributory negligence of, and assumption of risks by, an employee violating a rule or order of his master, see first foot-note of *Southern Ry. Co. v. Johnson* (Va.), 38 R. R. R. 487, 61 Am. & Eng. R. Cas., N. S., 487.

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open, and, after failing to open the knuckle on the car, plaintiff returned to the switch, and brought out the engine on the main line, heading towards the cars. He testified that he stepped upon the pilot and signaled the engineer to come ahead; that it was necessary to open the knuckle on the coupler, and, owing to the fact that the drawbar was loose and would swing to one side, necessary to hold it in place with his hands in order to make the coupling; that in doing this he stood with his right foot on the "heel" of the pilot, a small triangular projection about 6 inches outside the rail and a short distance in front of the front wheels of the engine; that his left foot was inserted between the slats of the pilot, and that he had hold of the "pin lifter" with his right hand, using his left to open the knuckle and hold the drawbar in position. The "pin lifter" is an iron rod extending across the front of the engine and connecting with the coupling apparatus. It is not intended for a handhold. Plaintiff testifies that, as he was attempting to push the drawbar in position, the pin-lifter rod pulled to one side, causing him to lose his balance, so that his right foot slipped from its support, went under the wheel, and was run over.

This action was brought to recover for the injuries sustained in the accident. The complaint charged that defendant was negligent (1) in having a defective automatic coupler on the front end of the engine; (2) in having a defective automatic coupler upon the freight car to which the engine was to be coupled. Defendant answered, denying that the accident was caused by any negligence on its part, and alleging contributory negligence and assumption of risk. The evidence tended to show the facts stated above, with others, mentioned hereafter. The court denied defendant's motion to direct a verdict, and submitted the case to the jury, which found a verdict for plaintiff. Defendant made the usual alternative motion, and this appeal is from an order denying such motion.

Defendant does not contend that the evidence did not make a case for the jury on the question of defendant's negligence in having defective couplers on the engine and car, but does contend (1) that such negligence was not the proximate cause of the accident; (2) that it was impossible for the accident to have happened as plaintiff claimed; (3) that it conclusively appears that plaintiff was guilty of contributory negligence; and that he was acting in disobedience to a rule of the company forbidding employees to ride on the pilots of engines. We will dispose of these contentions in the order stated.

[1] 1. On the question whether the defective couplers were the proximate cause of the accident, this court has decided cases substantially identical in facts with the case at bar, and on the authority of those cases defendant's contention must be overruled. *Turritin v. Railway Co.*, 95 Minn. 408, 104 N. W. 225; *Sprague v. Railway Co.*, 104 Minn. 58, 116 N. W. 104.

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2. Defendant insists that it is a physical impossibility that the accident happened as plaintiff testified. The argument was a proper one to address to the jury, but it does not convince us that the decision of the jury that the accident did happen in that way ought to be disturbed. We cannot say that it was impossible that, when the pin lifter slipped back and plaintiff was thrown backwards, his right foot could not have slipped from the pilot and in under the pony truck's wheel.

[2] 3. Does it conclusively appear from the evidence that plaintiff was guilty of contributory negligence? Defendant's claim in this regard is based upon (a) plaintiff's attempting to make the coupling by standing upon the pilot of the moving engine; and (b) upon his disobedience of the rule of the company forbidding employees to ride upon the pilot. Defendant contends that the coupling could and should have been made from the ground, by moving the engine to a point very close to the cars, then stopping it, putting the coupler in position so that it would strike the car coupler in the proper place, and then moving the engine ahead to make the coupling. But if it was necessary to adjust the coupler on the engine, and to hold it in position, it was probably necessary for plaintiff to get upon the pilot, and the danger would apparently be the same. The fact that there was an emergency, that both couplers were defective, and it was necessary to adjust and hold in position the one on the engine, must be considered in determining the question whether plaintiff acted with ordinary care, and we think it was a fair question for the jury.

It is undoubtedly the duty of employees of a railway company to implicitly obey all reasonable orders or rules, and a failure to do so will defeat a recovery by an injured employee if his disobedience was the proximate cause of his injury, unless obedience was impracticable under the circumstances. *Green v. Railway Co.*, 85 Minn. 318, 88 N. W. 974. It is fair to say, in our opinion, that the rule forbidding employees to ride on the pilots was not made to apply to a case where defendant's negligence made it necessary for an employee to get upon the pilot in order to perform his duty to his employer. Plaintiff may have gotten upon the pilot before it was absolutely necessary; but this does not seem material, if we grant the necessity of his taking that position at any time before making the coupling. The evidence indicates that there were orders to hurry, to get out of the way of a train that was expected. We conclude that the trial court was correct in holding that plaintiff's riding upon the pilot under the circumstances did not as a matter of law preclude his recovery. The question was properly left to the jury.

4. We have examined the other questions raised by the assignments of error, including the question of assumption of risk and rulings on the admission of evidence and on requests for instructions, and we find no reason to disturb the verdict.

NOCITA *v.* OMAHA & C. B. ST. RY. CO.

(Supreme Court of Nebraska, May 6, 1911.)

[131 N. W. Rep. 214.]

(Syllabus by the Court.)

Master and Servant—"Fellow Servant"—Definition.*—"Employment in the service of a common master is not alone sufficient to constitute two men 'fellow servants,' within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable, there must be some co-sociation in the same department of duty or line of employment." *Union P. R. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137.

Carriers—Injury to Passenger—Contributory Negligence.†—"Whether the act of a party in attempting to board a moving street car is negligence, or not, is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case." *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007.

Negligence—Questions for Court and Jury.—"It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence." *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007.

Carriers—Injury to Passengers—Negligence.—Even if the rule, sometimes announced, that the unbending test of negligence is the ordinary usage of the business in which defendant was engaged is the law, it could have no application to the question of negligence growing out of a sudden and violent jerking and starting of a street car, by which a plaintiff was injured.

(Additional Syllabus by Editorial Staff.)

Words and Phrases—"Spiker."—A "spiker" is a railroad workman whose duty it is to drive spikes into the cross-ties, by which the track rails are held in place.

Appeal from District Court, Douglas County; Day, Judge.

Action by Antonino Nocita against the Omaha & Council Bluffs Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see first foot-note of *Milton v. Frankfort*, etc., Tract. Co. (Ky.), 37 R. R. R. 651, 60 Am. & Eng. R. Cas., N. S., 651; second head-note of *Illinois Cent. R. Co. v. Hart* (C. C. A.), 36 R. R. R. 220, 59 Am. & Eng. R. Cas., N. S., 220.

†See last foot-note of *Orth v. Saginaw Valley Traction Co.* (Mich.), 37 R. R. R. 588, 60 Am. & Eng. R. Cas., N. S., 588.

Nocita v. Omaha & C. B. St. Ry. Co

Greene, Breckenridge & Matters, for appellant.

J. C. Kinsler, for appellee.

REESE, C. J. This is an action for damages resulting from a personal injury. Plaintiff recovered a judgment, and defendant appeals.

No serious question is presented as to the pleadings, and they will not be noticed, except to say that they are in the usual form, and the issues presented by the contentions of the parties will be sufficiently stated by the discussion of the points raised.

[5] The evidence is, to some extent, conflicting; but when considered as a whole the conflict is more apparent than real. There was sufficient submitted to the jury to sustain a finding that, at the time of the accident, plaintiff was in the employ of defendant as a laborer on the extension of defendant's line of street railway from Albright to Ft. Crook, and in the group of workmen known as "spikers," whose duty it was to drive spikes into the cross-ties, and by which the track rails were held in place; that he, and practically all the other laborers on the construction work, resided in the cities of Omaha and South Omaha, and defendant provided a work train, consisting of a motor car and flat car trailer, by which the men and materials were transported from the cities named to and from their work on the extension line; that on the morning of the accident plaintiff and another were standing on the street crossing, waiting for the approach of the car, as was their custom; that as the car approached the place where they were standing plaintiff signaled the motorman to stop, in order that he and the other person might board the car to be carried to their work; that there had been a rain that morning, or during the night before, and it was then cloudy, and plaintiff was carrying his dinner bucket and an umbrella; that upon his signal being given the motorman cut off the electrical current, or power, and applied the brakes, for the purpose of stopping the cars; that the cars were brought to nearly a full stop at the usual stopping place, when plaintiff sought to get on board, and in doing so caught hold of the upright prepared for that use and stepped with one foot upon the step of the car, when at that moment the power was applied, and the car was jerked violently forward, throwing plaintiff under the car in such a way as to cause his lower limbs to come under the wheels; one leg being run over near the knee, and being so badly crushed and lacerated as to require its amputation above the knee, and the foot of the other being so crushed as to require the amputation of one of his toes. No question is raised as to the fact of the injuries, as above stated, nor as to the amount of the recovery, provided plaintiff is entitled to recover at all. By the answer, all negligence of defendant is denied, and it is alleged that "the injuries received by the

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plaintiff were directly caused by his own negligence in attempting to board its car while the same was in motion."

It is alleged in the petition that the speed of the car was "slowed down" as it approached and crossed Williams street, until it came to almost a stop at the usual stopping place on the south side of Williams street. The evidence all showed that the car had not entirely ceased its motion when plaintiff attempted to get on board, and such is conceded to be the fact. But there was sufficient evidence to sustain a finding by the jury that the car (or train, as it is called in the evidence) came almost to a full stop at the usual place for stopping cars to receive and discharge those who might desire to board or leave the cars, and that at the time plaintiff sought to get on board the rate of speed was not to exceed one-quarter of a mile an hour, or one mile in four hours, which would scarcely amount to a movement—much less than one-half the speed an ordinary person would walk.

The question of the negligence of plaintiff in undertaking to board the car while so moving was submitted to the jury, with appropriate instructions. There was also sufficient evidence to warrant the jury in finding that just at the moment when plaintiff took hold of the support and placed his foot upon the step, where the motorman saw or could have seen him, the cars were started forward with such a violent jerk as to dislodge those on board from their seats, and by its action pull or jerk plaintiff loose from his hold, and throw him under the car wheels. This question of negligence on the part of defendant was also submitted to the jury, with proper instructions. Thus we have the question of the negligence of both parties submitted to the jury.

After the close of the evidence, counsel for defendant moved the court to instruct the jury to return a verdict in favor of defendant, and assigned the following grounds therefor: "(1) That the testimony fails to show, and does not tend to show, that the injury to the plaintiff resulted from actionable negligence on the part of the defendant as the proximate cause thereof. (2) The testimony shows that the defendant's motorman, at the time of the accident to the plaintiff, was operating the motor train in the usual and customary manner. (3) The testimony shows that the plaintiff's conduct in attempting to board the train before it came to a stop was the proximate cause of his injury. (4) If neither defendant nor plaintiff were guilty of negligence approximately (proximately) contributing to the jury, then the injury was itself an accident. (5) If said injury resulted from the negligence of Gillespie, such negligence was the negligence of a fellow servant of the plaintiff, and he cannot recover." Gillespie was the motorman in charge of the car.)

As to the first ground for the motion, we have already said, in substance, that what the testimony showed or failed to show as to negligence on the part of defendant was solely for the

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jury. The testimony of the witnesses, not entirely harmonious, was before them, and it was for them to decide. As to the second, it can hardly be said that the evidence showed conclusively that the motor train was operated in the usual and customary manner, even if the fact, if shown, would constitute an absolute defense, which we do not concede.

[2] As to the third ground, no court could rightly hold that, as matter of law, under the circumstances as detailed by some of the witnesses, plaintiff was guilty of contributory negligence which was the proximate cause of his injury. If the facts were as detailed by some of the witnesses, he probably was not. It was for the jury to decide as to which theory of the facts was the correct one.

As to the fourth and fifth grounds, they clearly involved questions of fact which it was not the province of the court to decide. The motion was rightly overruled. Under the evidence the cause presented questions of fact which could only be submitted to the jury for solution. If the evidence most favorable to plaintiff was believed by the jury, they were justified in finding that, under the circumstances, plaintiff was not guilty of negligence, in his efforts to board the train, owing to its very slow movement, for, for all practicable purposes, it had come to a full stop, and but for the violent lurch or jerk forward he would have been in no danger whatever, and therefore guilty of no negligence. This being true, the cases cited by defendant upon this point are not controlling.

[4] It is insisted that the court erred in refusing to give to the jury instruction numbered 2 asked by defendant. The instruction is quite lengthy, and need not be set out here in full. We may assume that it was in part correct, yet other portions were inapplicable to the case. It was sought to have the jury instructed that, in order to justify a finding that "defendant, through its motorman, was negligent in the operation and control of the motor car that ran over Nocita's leg, the plaintiff must establish, by a preponderance of the evidence, that the car was not operated as such cars and trains are ordinarily operated under similar circumstances and conditions, for the unbending test of negligence is the ordinary usage of the business. And the mere fact that an accident happened and the plaintiff received an injury does not raise any presumption that the defendant was negligent in the operation of its motor car and train." While the writer hereof takes little stock in the "unbending test" rule, as each case should be governed by its own facts and circumstances, yet, under no circumstances, could the so-called "unbending test" rule be applied to this case, even if it were a rational one, as there was no proof that the "ordinary usage of the business" was to apply the full force of the power just at the moment of time when plaintiff would be thrown from the car, as he was,

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and subjected to the danger of the injury, which he actually suffered. The question of the general operation and management of the train and cars was not in the case, and the cases cited do not apply.

Complaint is made of the refusal of the district court to give the fifth instruction asked by defendant. This instruction was a direction to return a verdict in favor of defendant, and contained the statement that plaintiff and the motorman were fellow servants; that defendant was not liable for the motorman's negligence, and the verdict should be in defendant's favor. There was no error in refusing this instruction.

[1] There is nothing in the evidence which proves that the motorman and plaintiff were fellow servants. Plaintiff, when at his work, was engaged in spiking down the rails. Gillespie, the motorman, was serving as lineman, putting up poles and wires at a distance from the track layers. True they were the servants of the same employer; but they were not engaged in the same kind of labor. Plaintiff was under the foreman of the "gang" with which he labored; while Gillespie was at that time the foreman of the wiring gang. A part of his duties was to run the cars from Omaha to the place of disembarkation; but in this there was no connection whatever with the transportation of plaintiff, such as to render them fellow servants. *Union P. R. Co. v. Erickson*, 41 Neb. 1, 13, 59 N. W. 347, 349, 29 L. R. A. 137. "The plaintiff was not associated with the defendant's motorman in running the car. His employment was in no wise connected with the operation of cars. For these reasons, plaintiff was not a fellow servant of the motorman." *Haas v. St. L. & S. R. Co.*, 111 Mo. App. 706, 715, 90 S. W. 1155, 1157.

It is insisted that the court erred "in applying the so-called 'last chance' doctrine to the facts of this case, and the misstatement of that rule." In this connection reference is had to the tenth instruction given to the jury. That instruction is too long to be here copied. Its substance is that if, in considering the question of the contributory negligence of plaintiff, such negligence would not necessarily prevent a recovery, if, after placing himself in a place of danger, the motorman saw or might have seen him and negligently failed to stop the car, or negligently started it with a jerk, while plaintiff was so situated, and such negligence was the proximate cause of plaintiff's injury.

[3] As hereinbefore stated, the car in which plaintiff sought passage had practically come to a stop at the time he attempted to board it. There was perhaps no negligence on his part in making the attempt. At any rate, the question was for the jury to decide. *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007. There is practically no dispute but that, at the

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time plaintiff made the effort to enter the car, the train was sent violently forward, with such force as to break the hold of plaintiff, and throw him under the wheels of the car. The jury must have found, and rightly, too, that the act of the motorman was one of negligence—a needless, careless, affirmative act, by which the life of plaintiff was endangered. If any objection to the instruction could be maintained, it would be that it was more favorable to defendant than the facts warranted. However, the instruction was evidently given to cover the case as contended for by defendant, and does not contain a misstatement of the law to its prejudice. It was properly given. *Omaha Street R. Co. v. Martin*, supra, 48 Neb. 71 et seq., 66 N. W. 1007.

We find no error in the record prejudicial to defendant, and the judgment of the district court is affirmed.

PIKE v. CEDAR RAPIDS & M. C. RY. CO.

(Supreme Court of Iowa, May 10, 1911.)

[131 N. W. Rep. 50.]

Master and Servant—Injury to Servant—Negligence.*—A street railway company which maintains its cross-wires for the support of its trolley pole about 16 feet from the surface while a city ordinance requires that the cross-wires shall not be less than 18 feet from the surface, is guilty of negligence toward an employee injured thereby.

Master and Servant—Injury to Servant—Contributory Negligence—Question for Jury.†—Whether a street railway conductor injured by coming in contact with cross-wires supporting a trolley wire while holding a broken trolley pole in place was guilty of contributory negligence held for the jury.

Master and Servant—Injury to Servant—Instructions.—In an action for injuries to a street car conductor coming in contact with

*For the authorities in this series on the subject of the duties and liabilities of railroad companies, as employers, with respect to objects or structures over or near tracks, see second foot-note of *New York, etc., R. Co. v. Dailey* (C. C. A.), 37 R. R. R. 681, 60 Am. & Eng. R. Cas., N. S., 681; first foot-note of *West v. Chicago, etc., Ry. Co.* (C. C. A.), 37 R. R. R. 663, 60 Am. & Eng. R. Cas., N. S., 663; fifth head-note of *Heilig v. Southern R. Co.* (N. C.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501.

†For the authorities in this series on the subject of the contributory negligence of railroad employees injured by structures or objects over or near tracks, see last foot-note of *West v. Chicago, etc., Ry. Co.* (C. C. A.), 37 R. R. R. 663, 60 Am. & Eng. R. Cas., N. S., 663; last paragraph of foot-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283.

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overhead wires while on top of a car holding a broken trolley pole in an effort to drive the car to the car barns, an instruction that the conductor was bound to exercise reasonable care in so doing, and was chargeable with all knowledge that, in the exercise of reasonable care, he might have acquired, and that the jury must consider the character of the work he was undertaking to do, the rules of the company, and his knowledge thereof as to whether he saw or should have seen the overhead wires to be a dangerous condition, whether, admitting that he saw the wires, such a situation arose as momentarily attracted his mind from the dangers of the wires, and the facts existing at the time, was not erroneous as attempting to excuse his negligence and limiting the jury to the facts surrounding him at the time of the accident.

Master and Servant—Injury to Servant—Scope of Employment.†—Where, in an action for injuries to a street car conductor coming in contact with overhead wires while on top of a car holding a broken trolley pole in an attempt to ride the car to the barns, the evidence showed that employees in cases of like accidents customarily returned the cars to the barns in the manner the car in question was taken at the time of the accident, and that the superintendent of the company observed the conductor on top of the car holding the trolley pole shortly before the accident without interposing any objection, a finding that the conductor was acting within the scope of his employment was justified, though the company had a rule that all breakage in the track or overhead system must be reported.

Master and Servant—Rules of Employment—Waiver.§—It is competent to prove a custom of employee at variance with a rule of the employer to show a waiver thereof by the employer acquiescing in the acts of the employees.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.—Where, in an action for injuries to a street car conductor by coming in contact with overhead wires while on the top of a car holding a broken trolley pole, the court charged that the motorman was a fellow servant, and that any directions given by him were not binding on the company, the error in admitting evidence that, when a car was disabled, the employee longest in service was in control, and that the motorman had been longest in the service, and that he directed the conductor to remain on the top of the car and hold the trolley pole, was not prejudicial.

†For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see last foot-note of *Alabama City, etc., Ry. Co. v. Sampley* (Ala.), 30 R. R. R. 528, 61 Am. & Eng. R. Cas., N. S., 528; last paragraph of last foot-note of *Heilig v. Southern R. Co.* (N. C.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501; second foot-note of *Conchin v. El Paso, etc., R. Co.* (Ariz.), 36 R. R. R. 192, 59 Am. & Eng. R. Cas., N. S., 192.

§See last foot-note of *Southern Ry. Co. v. Johnson* (Va.), 38 R. R. R. 487, 61 Am. & Eng. R. Cas., N. S., 487.

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Appeal from Superior Court of Cedar Rapids; C. B. Robbins, Judge.

Action for damages resulted in judgment against defendant, from which it appeals. Affirmed.

William G. Clark and *William E. Steele*, for appellant.

Rickel & Dennis and *P. W. Tourtellot*, for appellee.

LADD, J. [1] Negligence of the defendant was established conclusively. The ordinances of the city of Cedar Rapids required "the cross-wires or brackets, as the case may be, for the support of trolley wire, shall be attached to said posts at such a height as to maintain said trolley wire at every point not less than 18 feet above the surface of the street." A penalty was prescribed for violation thereof. The cross or span wire which caught plaintiff and threw him from the top of the car was nearly 2 feet less than 18 feet from the surface. The company was negligent in not maintaining the wire at the required height.

[2] 2. The main controversy is whether plaintiff also was negligent, and this contributed to his injury. He had been an extra conductor on the defendant's line for several months. At about 8 o'clock in the morning of September 5, 1907, the car started from Cedar Rapids for Marion; he acting as conductor and Cris Borchart as motorman. It has passed Fourth avenue, and, when backing up to turn, the trolley pole came from the wire and was bent. Plaintiff and Borchart went on top of the car, and, in trying to replace it with another pole, discovered that the spring which held the pole in place was broken. Plaintiff held the pole in place while the motorman guided the car to the barn. On starting back, plaintiff stood, but, as the pole when the car turned came near pulling him off, he got down on one knee, and shortly after it passed C avenue a span wire designed to hold the trolley wire in place caught and pulled him from the car. He testified that: "When I got near that span wire beyond C avenue, the trolley pole came off the wire, and I just got the pole replaced on the wire and turned around as I got a glimpse of the span wire that struck me about here, the top edge of the shoulder, and knocked me off the car and broke this leg above the ankle. I couldn't tell how far away from this span wire we were when the wheel came off the trolley. I didn't see the span wire before it struck me. I got a glimpse of it just as it struck me, but I felt it strike me, and felt pain at the upper edge of my shoulder about where it struck me. There was a running board probably a foot wide on top of the car, and I held my knee on it and my other foot down at the side of it, and I was holding the trolley pole, and, when I got within about 20 or 30 feet of the span wire, the trolley pole came off of the wire, and I looked around and straightened it

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up, and then just turned around and got a glimpse of this span wire as it struck me. I had not seen the span wire before that. Up to this time I had no difficulty with any other span wires or with the trolley wire until I was struck at C avenue. The span wire is the wire that holds the trolley wire in place in the center of the track, and is connected to posts in the parking at the sides of the streets. I was knocked to the ground on the west side of the car." He was facing the direction in which the car was moving, and could have seen the wires, had he looked, as they were in plain view. He was aware of their existence, but gave them no thought or attention as he was "engaged in holding the trolley pole. * * * It was getting pretty heavy down that part of the trip. When I put the wheel on the trolley wire immediately before the accident, I was looking back at the wire to adjust it. I put it on the wire. I would have to see the wire to put the pole on it. I suppose the wire was above my head. * * * I held the pole to one side of my shoulder. The wire would be to the side, straight up and to one side, and the trolley wire would be on a line with the pole and the side of my shoulder and above it. I would have to use force in holding the trolley wire up. It took quite a bit of energy to hold the pole to the wire. A person would have to use a good strong grip to hold it up against the wire in this position. The pole was heavy and hard to hold up. When the wheel would slip from the trolley wire, the trolley wire would go up and down. By my holding the pole with force against the wire its coming off would let the wire down." Plaintiff's negligence, if any, was in failing to avoid the span wire. None other had interfered nor for that matter had been observed. Presumably, as the car was eleven feet and five inches high, the wires should have been more than six feet above it and involved no danger. Plaintiff was bound, however, to make use of his senses, and, even though he may not have noticed the wires, he knew they were there and must be assumed to have seen what a man of ordinary diligence would have observed under like circumstances. He had been pressing the trolley wire upward continuously, so that the wire near him might have been somewhat higher than the span wire, and, as the latter was about 30 feet ahead at the time the wheel at the end of the pole got off the trolley wire, the elevation of the span wire above the car would then have been difficult to determine. Of necessity he looked back in connecting with the trolley wire again, and in doing so his attention was diverted so that he did not see the cross-wire, as otherwise he must have done, until it struck him. Had he noticed it an instant sooner, he could have dropped to the car, and thereby have avoided injury. The injury then is reduced to whether upon the wheel at the pole becoming disconnected from the

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wire he ought from what he then knew to have anticipated that, should he turn back to connect the pole with the wire again at that time, he likely would be caught by the span wire. Owing to the circumstances mentioned, we are of opinion that it cannot be said conclusively that a person of ordinary prudence would not have done what plaintiff did, and therefore the issue as to whether he was negligent was for the jury.

[3] 3. The third instruction is severely criticised, and for this reason may be set out: "The plaintiff was bound to use reasonable ordinary care and vigilance in undertaking to ride the car in question to the barn, and is chargeable with all the knowledge that in the exercise of reasonable and ordinary care and vigilance he might and should have required as regards any perils or hazards in what he undertook to do. In determining this question, you must take into consideration the character of the work he was undertaking to do, which was not the character of work usually performed by the conductors upon the line of the defendant company, the rules of the defendant for his conduct and his knowledge thereof, the situation at the exact time of the accident, as to whether or not he saw or should have seen that the span wire, by which he claims to have been knocked from the car, was in such a condition as to be dangerous to a man in the position in which he was situated on top of the car, whether or not, admitting that he saw or should have seen the wire in question, such a situation arose as momentarily attracted his mind from the dangerous position of the wire, as claimed by him; and you must also take into consideration the other facts and circumstances as they existed at the time of his injury. And after taking into consideration all of these things, unless the plaintiff has satisfied you by the greater weight or value of the evidence that the injury of which he complains was not caused or contributed to in any manner by his own negligence, then you are instructed that your verdict must be for the defendant." First, it is said that the recital of matters to be considered "amounts to an effort to palliate and excuse" plaintiff's negligence. But this is without foundation. Necessarily matters bearing on plaintiff's conduct only were alluded to, and it was error to mention those in his favor as the fact that he was not engaged in his usual occupation as well as to direct attention to those having a contrary tendency. It is not open to the criticism of enumerating matters bearing in one direction and omitting all others as were the instructions condemned in the numerous authorities cited. The propriety of referring to his attention being diverted from observing the position of the wire ought not to be questioned. Suppose he had been giving the wire no concern. This may have been owing to its elevation out of harm's way. It does not follow that he might not have seen the cross-wire but for such diversion.

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Surely one's attention may be so diverted that he will not discover danger which he otherwise would even though he had given it no previous thought. Complaint is made of that portion of the instruction which limits the jury to facts and circumstances surrounding him at the time of the injury. What other facts and circumstances would appellant have considered? Certainly those relating to some other time would not have been pertinent to the issue being tried. Another criticism is of that portion of the instruction suggesting consideration of the situation at the exact time of the accident, as to whether or not he saw or should have seen that the span wire by which he claims to have been knocked from the car was in such condition as to be dangerous to a man in the position in which he was situated on the top of the car. This was correct, for, unless he ought to have seen the wire so placed as to render it dangerous to a man in his situation, he was not negligent. This did not exclude, as he argued, what may have happened previously or plaintiff's situation with reference to the wire prior to the time of the accident. Indeed, these matters seem to have been contemplated and the design of the court to have been to concentrate attention on the proposition as to whether plaintiff in view of what had previously occurred should, at the time of the accident, have observed the wire and its dangerous proximity. If in the exercise of reasonable care he should have seen the wire, then, of course, he could have avoided it by dropping to the car, and could not recover. Though not inclined to commend the language of the instruction, we are not disposed to exaggerate expressions which could not have misled the jury into reversible errors.

[4] 4. Appellant contends that the evidence failed to show that plaintiff was at work within the scope of his employment when injured, and seems to rely upon a rule of the company reading: "All breakage or imperfections in the track or overhead system must be reported by both conductor and motorman in their daily reports. When any such require immediate repair notice must be sent at once to the superintendent's office." Upon discovery that the spring was broken, there was some discussion as to whether the office should be telephoned for a car, but this was not done. Counsel argue that plaintiff was without authority because of this rule to do otherwise than notify the company. It is by no means clear that the breakage was within this rule. What was the "overhead system"? It might well have been construed to be the network of wires above through which the power was applied, and not the cars or any of their attachments. The platform containing the spring was on the car, and an extra pole was carried to replace any injured while out on the track. But, if there be doubt, the rule had been construed as suggested, for the evidence was undis-

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puted that employees in event of like accidents customarily returned the cars to the barn as this was being taken at the time of the injury. Moreover, the superintendent observed plaintiff on top of the car holding the trolley pole shortly before the accident without interposing any objection.

[5] It was also competent to prove this custom of the employees at variance with the rule, if it was, and acquiescence therein by the officers of the company as establishing waiver thereof as the court instructed. *Lowe v. Railway*, 89 Iowa, 420, 56 N. W. 519. The evidence justified the finding that plaintiff was acting within the scope of his employment.

[6] 5. It appeared that the motorman had been longest in defendant's service, and that he directed plaintiff to remain on top of the car and hold the trolley pole, and evidence was introduced over objection to the effect that, when a car was disabled, the employee longest in the service was in control. On what theory this evidence was received is not apparent, unless, as suggested by appellant, it was that the motorman in such a situation became a vice principal. Be this as it may, the court instructed that the motorman was but a fellow servant of plaintiff and any directions given him by the former were not binding on the defendant. The latter contends that the evidence was prejudicial, but does not indicate in what respect. In view of this instruction, it seems impossible that whether such a custom existed could have had the slightest influence on the result.

Other rulings criticised are approved, and the judgment is affirmed.

REGAN v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, April 4, 1911.)

[94 N. E. Rep. 691.]

Master and Servant—Railroads—Section Hands—Care Required of Servant.—A section hand on a steam railroad must look out for passing trains, and the same rule applies in a freight yard, where the danger arises from single cars, locomotives, or parts of trains.

Master and Servant—Injuries to Servant—Contributory Negligence.—Where deceased, a section foreman, while repairing a track in a railroad yard, where there was frequent shifting of cars and passing of locomotives, was told by the conductor of a shifting crew in the yard that no more cars would be sent down on any track so as to interfere with deceased's work, deceased was relieved of the duty of watching for cars coming from such conductor's engine.

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Regan v. Boston & M. R. R

Action by Annie Regan, administratrix, against the Boston & Maine Railroad. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Samuel A. Fuller, for plaintiff.

Trull & Wier, for defendant.

RUGG, J. This is an action of tort to recover damages for the conscious suffering and death of a foreman of a section gang in the employ of the defendant. The plaintiff's intestate was working in a railroad yard, where there was frequent shifting of cars and passing of locomotives, and he was repairing a track called "13," adjoining and branching from which was another called "15." There was evidence tending to show that one Currier, who was the conductor of a shifting crew in this yard, asked the plaintiff's intestate if he could set "two cars in" on track "13," and he was answered, "Yes, you can, but you can't bother me any more until this job is done." Currier replied, "All right," and soon after put two cars on that track. About half an hour later by Currier's direction a car was shunted onto track "15," which struck the plaintiff's intestate as he was stooping at his work on track "13," very near its junction with track "15" and where the two tracks were 10 to 18 inches apart.

It is plain that if there had been no talk between Currier and her intestate the plaintiff could not recover. It was said in *Morris v. Boston & Maine Railroad*, 184 Mass. 368, 371, 68 N. E. 680, 681: "By the nature of his employment a section hand on a steam railroad must look out for passing trains, and such is the settled law of this commonwealth." The same rule applies in a freight yard where the danger arises from single cars, locomotives or parts of trains. *Byrnes v. N. Y., N. H. & H. R. R.*, 195 Mass. 437, 81 N. E. 187; *Dolphin v. N. Y., N. H. & H. R. R.*, 182 Mass. 509, 65 N. E. 820; *Lynch v. Boston & Albany R. R.*, 159 Mass. 536, 34 N. E. 1072.

The conversation with Currier was susceptible of the interpretation that he, being in charge of the shifting, agreed with the plaintiff's intestate that no cars after the two specifically mentioned would be sent down upon any track in such a way as to interfere with the work the latter was doing on track "13." If this was found to be the fair import of the language used, then the intestate while so engaged and relying upon this assurance was relieved of the duty of watchfulness as to cars coming from Currier's engine. *Edgar v. N. Y., N. H. & H. R. R.*, 188 Mass. 420, 74 N. E. 911; *San-tore v. N. Y., C. & H. R. R.*, 203 Mass. 437, 89 N. E. 619; *Welch v. N. Y., N. H. & H. R. R.*, 182 Mass. 84, 64 N. E. 695.

Exceptions overruled.

HENRY v. HUDSON & M. R. Co.

(Court of Appeals of New York, Feb. 28, 1911.)

[94 N. E. Rep. 623.]

Master and Servant—Safe Place to Work—Scope of Employer's Duty.*—The rule that a master must provide a safe place to work for his employees applies only where he furnishes the place where the work is carried on, and does not apply where prosecution of the work makes the place, as in constructing a tunnel.

Master and Servant—Safe Place of Work—Employer's Duty.*—A master is liable for his employee's conduct in failing to maintain safe the place where work is to be done; but his liability is much more limited for defects in prosecuting the work.

Master and Servant—Acts of Fellow Employees—Employer's Liability.†—An employer is not liable to one employee for negligence of another, if he conducts the work properly and prescribes proper rules; but when he knows that negligence of one set of employees has imperiled a fellow employee, he must adopt reasonable means to secure compliance with the rules, proper performance of the work, and removal of the danger.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Delia Henry, as administratrix of Patrick Henry, deceased, against the Hudson & Manhattan Railroad Company. From a judgment of the Appellate Division (139 App. Div. 913, 123 N. Y. Supp. 1120), affirming a judgment for defendant on a nonsuit, plaintiff appeals. Reversed, and new trial granted.

M. Spencer Bevins, for appellant.

Wm. C. Cannon, for respondent.

CULLEN, C. J. The action was brought by the personal representatives of a deceased employee against his employer to recover damages for the death of the employee. The defendant was engaged in constructing a tunnel in New Jersey. The tunnel was being driven through a mass of rock. The method of work was to blast the rocks at the head of the tunnel by a gang of men called "drillers," and the material cast down by the blast was loaded by another gang into a car and taken out

*See foot-note of *Potomac, etc., R. Co. v. Chichester* (Va.), 37 R. R. R. 611, 60 Am. & Eng. R. Cas., N. S., 611; *New York, etc., R. Co. v. Dailey* (C. C. A.), 37 R. R. R. 681, 60 Am. & Eng. R. Cas., N. S., 681; first head-note of *House v. Southern R. Co.* (N. C.), 36 R. R. R. 508, 59 Am. & Eng. R. Cas., N. S., 508; second head-note of *Maue v. Erie R. Co.* (N. Y.), 36 R. R. R. 232, 59 Am. & Eng. R. Cas., N. S., 232.

†See foot-note of *Wickham v. Detroit United Ry.* (Mich.), 35 R. R. R. 321, 58 Am. & Eng. R. Cas., N. S., 321.

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of the tunnel. The plaintiff belonged to the last-named gang, who were called "muckers." It was also the duty of the blasters to remove or pull down any pieces of rock which, after the blast, might project or be loose and in danger of falling. On the occasion of the accident the plaintiff, with the others of his gang, was sent by his foreman to remove the excavated material at the end of the tunnel. While there, a piece of loose rock fell upon him, causing his death.

The principle that the master is bound to provide his servant a safe place to work applies only where, in the conduct of the work, the master furnishes the place where the work is carried on. *McGuire v. Bell Telephone Co. of Buffalo*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437. It has no application to a case like the one before us, where the prosecution of the work itself makes the place to work. *Di Vito v. Crage*, 165 N. Y. 378, 59 N. E. 141. This distinction should be clearly borne in mind when dealing with a common-law action for negligence; for, while the master is liable for the conduct of his servants in failing to maintain safe the place where the work is to be done, his liability is much more limited for defects in the prosecution of the work. *Neagle v. Syracuse, B. & N. Y. R. R. Co.*, 185 N. Y. 270, 77 N. E. 1064, 25 L. R. A. (N. S.) 321. The common-law liability has been altered in this state in several respects by statute, but these statutes have no bearing on the case, as the accident occurred in New Jersey.

The failure of the blasters to remove or pull down the loose rock was plainly the negligence of fellow servants, and if this had been all there was in the case the nonsuit would have been properly granted. But there was more. Evidence was given on behalf of the plaintiff that the day before the accident one Montgomery, who was the general superintendent of the work, was told by one of the workmen that the rocks at the head of the tunnel were dangerous and likely to fall, to which Montgomery replied that they did look pretty dangerous, and that he would have them removed by nightfall. The loose rocks were not removed, and there if no proof in the case (the complaint having been dismissed at the close of the plaintiff's case) that Montgomery did anything to have them removed, or took any precautions against the danger. Now, while it is true that the master is not liable to one servant for the negligence of another, when he conducts the work in a proper manner and prescribes proper rules for its performance, yet, when he knows that one set of servants have so negligently done their work as to occasion danger to a fellow servant, it is his duty to interpose and take reasonable means to see that the rules are complied with, the work properly done, and the danger removed. *O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317, 76 N. E. 161. If there were negligence on the part of the master in this accident, it lay just here.

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The judgment should be reversed, and new trial granted; costs to abide event.

GRAY, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.
HAIGHT, J., absent.

Judgment reversed, etc.

ROGERS v. PERE MARQUETTE R. Co.

(Supreme Court of Michigan, May 8, 1911.)

[131 N. W. Rep. 159.]

Master and Servant—"Fellow Servant"—Engineer and Telegraph Operator.*—A telegraph operator, whose mistake in receiving a train order from a train dispatcher in another city resulted in a collision, was a "fellow servant" of the engineer to whom the order was given; that the order originated with the train dispatcher, a vice principal of the engineer, not changing the engineer's relation to the operator.

Error to Circuit Court, Wayne County; James O. Murfin, Judge.

Action by Wilson I. Rogers against the Pere Marquette Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before OSTRANDER, C. J., and BIRD, HOOKER, BLAIR, and STONE, JJ.

Dohany & Dohany, for appellant.

McPherson, Bills & Streeter, for appellee.

BLAIR, J. Plaintiff, an engineer in defendant's employ, was badly injured on the morning of July 20, 1907, in a collision of two trains at Salem, Mich. A special passenger train was to leave Ionia on the morning of July 20, 1907. It was known as an excursion train; its destination being the city of Detroit. At 2:26 o'clock in the morning of July 20th an order, known as "Order No. 31," was issued by the chief train dispatcher in the city of Detroit, and sent to the operator at Plymouth, who transcribed it and delivered it to the plaintiff. Plaintiff, in proceeding westward with his train, was to be governed by this special order. In transcribing the order the operator at Plymouth made a mistake, as a result of which a head-on collision occurred, and several passengers were killed and a number of

*For the authorities in this series on the question whether train dispatchers and telegraph operators are fellow servants of other railroad employees, see first foot-note of *Ricker v. Central R. Co.* (N. J.), 22 R. R. R. 109, 45 Am. & Eng. R. Cas., N. S., 109.

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others injured, and plaintiff received the injuries for which this action is brought. Plymouth is what is known as an initial point, and for the purposes of this case it is agreed that plaintiff was free from negligence, and that the operator at Plymouth was negligent, and that if this court holds that the operator at Plymouth, who made the mistake in transcribing the dispatch, was a fellow servant of plaintiff, he is not to recover. If the operator at Plymouth was not a fellow servant in receiving and transcribing the dispatch, then plaintiff is entitled to a judgment of \$5,000.

The position of the plaintiff relative to the relation of the receiving telegraph operator to the trainmen, as stated in his brief, is as follows: "A train order is a written document, the character of which is a matter of common knowledge to practically every one. Because of its extreme importance in modern railroading, it must be accurate in every detail. As we understand it, two important elements enter into the composition of a train order, namely, substance and form. Not only must it be accurate in substance, but it must be accurately formulated. A train order sent out by a chief dispatcher cannot be considered properly formulated until it is legibly and properly copied in writing upon paper by the operator who receives it. In so far as the substance of the particular train order in question is concerned, it originated in the mind of the chief dispatcher at Detroit some time during the night preceding the day of the accident, and he wired it to the operator at Plymouth at about 2:30 o'clock a. m. There is no doubt but that the chief dispatcher conceived in his own mind what is considered a safe and reliable train order, but until it was put in writing by the operator at Plymouth it lacked form and could carry no intelligence to the plaintiff. Without the aid and assistance of the operator, it could never have assumed either the form or effect of a complete order, and in no way could it have directed or controlled the operation of plaintiff's train. An imaginary schedule of stations along a particular line of railroad, with the hours at which a train will arrive at and leave such stations, in the mind of a train dispatcher, does not constitute a train order. Something further must be done before it can assume the form of a written document ready for delivery to the trainmen. A chief dispatcher, standing alone and without the assistance of an operator, cannot prepare such an order for delivery. It is therefore plain that an operator at a station is a necessary adjunct of the dispatcher at headquarters in the making up of train orders. The operator at Plymouth was merely the arm of the dispatcher at Detroit, giving form to an order, the substance of which originated in the mind of the dispatcher."

As we understand the record, there is no claim that the train dispatcher was personally guilty of any negligence in transmit-

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ting the order, or in failing to require the order to be repeated to him by the operator, or in receiving an incorrect response and neglecting to make correction. Upon this understanding of the record, we hold that the circuit judge did not err in deciding that the operator was a fellow servant of the plaintiff. *Moon v. P. M. R. R. Co.*, 143 Mich. 125, 106 N. W. 715, 108 N. W. 78; *Veit v. A. A. R. Co.*, 150 Mich. 358, 114 N. W. 233; *Graham v. D., G. H. & M. R. Co.*, 151 Mich. 629, 115 N. W. 993, 25 L. R. A. (N. S.) 326; *Steuer v. A. A. R. Co.*, 160 Mich. 207, 125 N. W. 47.

The judgment is affirmed.

INGRAM v. LOUISIANA & N. W. R. Co. et al.

(Supreme Court of Louisiana, May 22, 1911. On Application for Rehearing, June 17, 1911.)

[55 So. Rep. 580.]

Master and Servant—Injury to Servant—Contributory Negligence—Last Clear Chance.*—Where defendant railroad company has a last clear chance to prevent an accident and does not avail itself of it, it will be mulcted in damages.

Master and Servant—Personal Injuries—Exemplary Damages.†—Where defendant's employee in operating his train displays reckless disregard for human life, exemplary damages will be awarded for any resulting loss and injury.

Operation of Railroads—Care Required.‡—Railroad companies are held to the greatest care and diligence both in regard to the machin-

*For the authorities in this series on the subject of the last clear chance doctrine, see last foot-note of *Edge v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 737, 61 Am. & Eng. R. Cas., N. S., 737; last head-note of *Louisville, etc., R. Co. v. Trisler* (Ky.), 38 R. R. R. 650, 61 Am. & Eng. R. Cas., N. S., 650; last foot-note of *Welsh v. Tri-City Ry. Co.* (Iowa), 37 R. R. R. 398, 60 Am. & Eng. R. Cas., N. S., 398; last head-note of *Belle Alliance Co. v. Texas, etc., Ry. Co.* (La.), 37 R. R. R. 43, 60 Am. & Eng. R. Cas., N. S., 43; first foot-note of *Denver City Tramway Co. v. Wright* (Colo.), 36 R. R. R. 360, 59 Am. & Eng. R. Cas., N. S., 360; sixth head-note of *Farris v. Southern R. Co.* (N. C.), 36 R. R. R. 523, 59 Am. & Eng. R. Cas., N. S., 523.

†For the authorities in this series on the question when exemplary or punitive damages may, and may not, be recovered, see foot-note of *Black v. Charleston, etc., Ry. Co.* (S. C.), 38 R. R. R. 541, 61 Am. & Eng. R. Cas., N. S., 541; first foot-note of *Illinois Cent. R. Co. v. Dodds* (Miss.), 38 R. R. R. 508, 61 Am. & Eng. R. Cas., N. S., 508; last foot-note of *Baltimore, etc., R. Co. v. Strube* (Md.), 37 R. R. R. 319, 60 Am. & Eng. R. Cas., N. S., 319.

‡For the authorities in this series on the subject of the degree of care due a servant, see last foot-note of *Pinkley v. Chicago, etc., R. Co.* (Ill.), 38 R. R. R. 791, 61 Am. & Eng. R. Cas., N. S., 791;

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ery and equipment of their roads and the acts of their officers and agents. *Hanson v. Railroad Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *Lynn v. Antrim Lumber Co.*, 105 La. 455, 29 South. 874.
(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; S. J. Henry, Judge.

Action by R. T. Ingram against the Louisiana & Northwestern Railroad Company and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Scarborough & Carver and *Alexander & Wilkinson*, for appellants *Frost-Johnson Lumber Co.* and *Prestridge, Buchanan Logging Co.*

John A. Richardson, for appellant *Louisiana & N. W. R. Co.*
Breazeale & Breazeale, for appellee.

SOMMERVILLE, J. Plaintiff was employed by defendant railroad company as section foreman, having supervision of some 6 miles of track, embracing the track on a trestle or bridge running some 1,600 feet over Black Lake, in Natchitoches parish. This bridge was at an average height of some 23 feet. While traversing this bridge plaintiff was overtaken by a locomotive drawing a logging train, and he was very severely injured.

The railroad company leased some 3 miles of its tracks to the Frost-Johnson Lumber Company and its assignees, including the 1,600 feet of track over Black Lake. The lumber company as-

last head-note of *Houston & T. C. R. Co. v. Alexander* (Tex.), 38 R. R. R. 464, 61 Am. & Eng. R. Cas., N. S., 464.

For the authorities in this series on the subject of the degree of care required of a master in furnishing appliances, see second foot-note of *Florida E. C. Ry. Co. v. Lassiter* (Fla.), 37 R. R. R. 600, 60 Am. & Eng. R. Cas., N. S., 600; first foot-note of *St. Louis, etc., R. Co. v. Rogers* (Ark.), 37 R. R. R. 297, 60 Am. & Eng. R. Cas., N. S., 297; first foot-note of *Massy v. Milwaukee Electric Ry. & Light Co.* (Wis.), 36 R. R. R. 656, 59 Am. & Eng. R. Cas., N. S., 656; first head-note of *House v. Southern R. Co.* (N. Car.), 36 R. R. R. 508, 59 Am. & Eng. R. Cas., N. S., 508; first head-note of *Delaware, etc., R. Co. v. Royce* (C. C. A.), 36 R. R. R. 217, 59 Am. & Eng. R. Cas., N. S., 217.

For the authorities in this series on the subject of the degree of care required of a master in inspecting appliances, see first foot-note of *St. Louis, etc., R. Co. v. Rogers* (Ark.), 37 R. R. R. 297, 60 Am. & Eng. R. Cas., N. S., 297; third head-note of *Erie R. Co. v. Schorner* (C. C. A.), 35 R. R. R. 303, 58 Am. & Eng. R. Cas., N. S., 303.

For the authorities in this series on the subject of the degree of care required of a master in furnishing and maintaining a safe work place, see first foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; first foot-note of *New York, etc., R. Co. v. Dailey* (C. C. A.), 37 R. R. R. 681, 60 Am. & Eng. R. Cas., N. S., 681; foot-note of *Potomac, etc., R. Co. v. Chichester* (Va.), 37 R. R. R. 611, 60 Am. & Eng. R. Cas., N. S., 611.

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signed its lease to the Prestige-Buchanan Logging Company, which company was operating the train at the time of the accident referred to.

Plaintiff sues the three companies named, in solido, for \$15,000 in damages. There was trial by jury, and a verdict and judgment for \$10,000, from which the three defendants have appealed.

A large amount of evidence is found in the record, and it has been fully discussed orally and by brief. We have considered it carefully, and we think with the jury that plaintiff has made out a case against defendants. He was on a hand car, returning home from work at the close of the day, when he, and the men with him, saw the locomotive and logging train approaching from the opposite direction. He and his men had a right to be on the track. It was their duty to keep this certain section of track in good order and repair. They signaled the oncoming train, which signaled in return for them to retrace the way they had come; and they immediately obeyed the order, but the engineer on the locomotive was evidently driving the logging train at a great rate of speed, regardless of the rule of the railroad company to run at a rate not to exceed six miles an hour over the bridge. He was running at a rate of speed several times six miles an hour, and in utter disregard of life and safety of property. [1] It was the bounden duty of the engineer when he saw the hand car with its load of human freight on the track some 1000 feet distant to have stopped his train in time to have avoided the accident and resulting damages. He had a clear chance to have done so, and it was negligence on his part not to have done it. His conduct on the occasion was willful and criminal. This conclusion is strengthened by the remark of the engineer on the evening of the accident to the effect that "he [the section foreman] met the wrong man this evening." It appears that on another occasion, or occasions, plaintiff had met another engineer who had backed off the bridge to permit plaintiff to continue his journey.

Defendants charge that plaintiff was negligent in not stopping, looking, and listening when he started to cross the bridge. We have seen that plaintiff's duty required him to be on the track. But, if he had been negligent, defendants had the last clear chance to have avoided the accident, and they did not avail themselves of it. Plaintiff and his men reversed their hand car as signaled by the engineer, and they earnestly tried to run out of the way of the oncoming locomotive. Defendants claim that plaintiff and his men should have jumped from the hand car. If they had jumped, the hand car would have remained on the track, there would have been a collision, the train perhaps derailed, and all parties killed. The wiser plan was to do as plaintiff did, and as ordered by the engineer of the locomotive, to try and get out of the way. [3] It was inconceivable on plaintiff's part that the

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engineer would ruthlessly run him and his men down. The engineer seeks to excuse himself by claiming that one of the air brakes on his locomotive was defective. If it was, it should not have remained defective. This is not a sufficient excuse to release defendants. But the testimony does not sustain this contention. If his engine had become suddenly defective, the engineer should have given a distress signal, which would have warned plaintiff to take the chances of jumping and saving himself, rather than to trust himself and his fellows to the humanity of defendant's engineer.

Plaintiff sustained a fracture of the leg, a sprained ankle, a contused shoulder, and injury to the back. These injuries are slight by way of comparison with what they might have been when the hand car came into collision with a rapidly moving train, and was knocked from a bridge or trestle some 23 feet high.

[2] Plaintiff is entitled to both actual and exemplary damages; but we think the verdict is too high.

The verdict and judgment appealed from are amended by reducing them to \$5,000; and, as thus amended, the judgment appealed from is affirmed.

On Application for Rehearing.

LAND, J. Our decree in this case was based on the doctrine of the last clear chance, which implies negligence on both sides. Plaintiff was guilty of negligence in not stopping, looking, and listening before driving his hand car on the bridge. The engineer was guilty of gross negligence in driving his train onto the bridge at a greater rate of speed than six miles an hour.

The engineer discovered the danger when the hand car was at a distance of about 1,000 feet away. He signaled the plaintiff to back the hand car. The plaintiff did so. The engineer stated that, when he found that the locomotive was beyond control on account of a defective air brake, he signaled the plaintiff to jump. Plaintiff testified that he saw no such signal. The inference from the testimony of the engineer is that he could have stopped the train in time to avert the accident, if the air brake had been in proper condition. If such was the case, ordinary prudence demanded the resort to other means to stop the train. An experienced railroad man testified that the train could have been stopped by the use of the reverse lever.

The hand car was lawfully on the track. The question is whether the engineer, as soon as he discovered the hand car on the track, used every effort to prevent a collision; or, in other words, whether he could have avoided the accident by the exercise of that degree of diligence demanded by the emergency of the case. On this issue the evidence is conflicting. The jury heard the witnesses, and viewed the bridge. Their verdict shows that they evidently found that under all the circumstances of the

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case the train could and should have been stopped in time to aver: the accident.

The question was one of fact for practical men to decide, and, after considering the evidence, we are not prepared to say that the verdict is erroneous, especially as there is also evidence tending to show reckless indifference to consequence on the part of the engineer.

The contention that the lessee is not liable because it sublet its franchise to use the railroad tracks is without force, because the lessee is bound both by law, and in this case also by contract, in the same manner as the lessor railroad would have been. *Muntz v. Railroad Co.*, 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495; *Hamilton v. Railroad Co.*, 117 La. 243, 41 South. 560, 6 L. R. A. (N. S.) 787.

On reconsideration, however, we are satisfied that we erred in making any allowance for punitive damages, as there is no evidence that the defendants authorized, ratified, or approved the conduct of the engineer on the occasion in question. See *Patterson v. New Orleans & C. R. Light Power Co.*, 110 La. 797, 34 South. 782, and authorities therein cited.

The small bone of plaintiff's leg was broken, his ankle was sprained, and he was bruised on the shoulder. At the time of the trial of case the plaintiff was able to walk without assistance, but he complained of pains now and then in his ankle, and of severe pains in the back. The attending physician testified that on his first visit to the plaintiff the latter did not complain of pains in his back, but did so the next day, and continued to complain from that time on. The physician further testified that after a thorough examination of plaintiff's back he could not discover any lesion or injury that would account for the pain complained of by the plaintiff, and that such pain might have been the result of malaria or rheumatism. Under these circumstances, we are disinclined to allow any considerable amount for pain and suffering which may have been merely temporary. We are of opinion that an award of \$2,000, with costs in both courts, is a sufficient compensation for the injuries sustained.

It is therefore ordered that our former decree herein be amended by reducing the amount to \$2,000, with costs in both courts, and, as thus amended, said decree be reinstated and made the final judgment of the court.

And it is further ordered that in all other respects a rehearing is refused.

, KRUCK *v.* CONNECTICUT CO.

(Supreme Court of Errors of Connecticut, June 15, 1911.)

[80 Atl. Rep. 162.]

Carriers—Passengers—Injuries—Burden of Proof.*—In an action against a street railway company for death caused by collision of a street car with plaintiff's intestate while awaiting the car to take passage thereon, the plaintiff assumes the burden of showing by a preponderance of the evidence the defendant's negligence and her intestate's freedom from contributory negligence.

Trial—Taking Case from Jury—Sufficiency of Evidence.—To prevent a nonsuit, the evidence of plaintiff, on whom the burden of proof rests, must be such as to furnish more than a mere guess, surmise, or conjecture, and plaintiff is bound to remove the issues from the realm of speculation and to establish facts affording a logical basis for the inference which she claims.

Carriers—Passengers—Last Chance Doctrine.†—In an action for the death of one intending to take passage on a street car, to authorize a recovery on the theory of negligence of the defendant, supervening contributory negligence of the plaintiff's intestate, it must appear that the motorman failed to exercise reasonable care after the peril of the intestate became, or in the exercise of due care ought to have become, known to him, when from the exercise of such care the intestate would not have been injured.

Carriers—Passengers—Action for Causing Death—Weight of Evidence.—In an action for causing death of one intending to take passage on a street car, evidence held insufficient to show negligence

*For the authorities in this series on the subject of the burden of proving negligence, see first foot-note of *Holland v. Northern Pac. R. Co.* (Wash.), 33 R. R. R. 264, 56 Am. & Eng. R. Cas., N. S., 264; first foot-note of *Arkansas & L. Ry. Co. v. Sain* (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579.

For the authorities in this series on the subject of proving contributory negligence, see last foot-note of *Tecker v. Seattle R. & S. Ry. Co.* (Wash.), 38 R. R. R. 229, 61 Am. & Eng. R. Cas., N. S., 229; first foot-note of *Danskin v. Pennsylvania R. Co.* (N. J.), 37 R. R. R. 414, 60 Am. & Eng. R. Cas., N. S., 414; last paragraph of first foot-note of *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99. *

For the authorities in this series on the subject of the presumption that a person killed by a train or street car exercised due care for his own safety, see second foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; seventh head-note of *Gray v. Chicago, etc., R. Co.* (Iowa), 37 R. R. R. 420, 60 Am. & Eng. R. Cas., N. S., 420; second head-note of *Danskin v. Pennsylvania R. Co.* (N. J.), 37 R. R. R. 414, 60 Am. & Eng. R. Cas., N. S., 414; first head-note of *Stack v. East St. Louis, etc., Ry. Co.* (Ill.), 37 R. R. R. 410, 60 Am. & Eng. R. Cas., N. S., 410.

†For the authorities in this series on the subject of the last clear chance doctrine, see first foot-note of preceding case.

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of the motorman after he knew, or ought, in the exercise of reasonable care, to have known, of the danger of plaintiff's intestate.

Carriers—Passengers—Action for Causing Death—Weight of Evidence.—In an action for causing the death of one intending to take passage on a street car, evidence held insufficient to show that failure of the motorman to turn off the searchlight when he saw, or ought to have seen, the intestate in the street intending to board the car, was negligence.

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Action by Marie Kruck, administratrix, against the Connecticut Company for personal injuries resulting in the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. From an order refusing to set aside a judgment of nonsuit, plaintiff appeals. Affirmed.

The plaintiff offered evidence of the following facts: The plaintiff's intestate was killed by being hit in the head by the front end of a passing trolley car which he was expecting to board after dark. Boswell avenue, upon which the accident happened, has a double line of trolley rails laid upon its westerly side. The rail farthest east lies in about the middle of the avenue, and is 18.7 feet from the east gutter. A few feet northerly of the point of accident are a pair of poles marked to indicate a place where cars will stop when desired. Ninety-eight feet northerly of the poles is an incandescent street light. On the east side of the avenue directly opposite the point of accident and standing near to the street is a hotel. To the south the tracks extend in a straight course for a distance of about 400 feet, and there is no obstruction to the view.

The car which hit the intestate was coming from the south on the easterly lines of tracks. It was equipped with an electric searchlight carried in front. The radiating rays of this light, which was and remained in operation, would light up the full width of the avenue at the place of accident from the point where the car was when signaled, as hereinafter stated, and continuously thereafter until the car was close to that place. They are so powerful as to be dazzling and blinding to the eye when looked at.

Only one witness of the occurrence was produced. He testified that he and the intestate were together in the barroom in the front of the hotel, when the latter, who was familiar with the surroundings, heard the approach of the car, which he desired to take; that the intestate started for the street; that he arrived there, and being, to use the language of the witness, out in the middle of the street, he held up his hand as a signal for the car, which was then about 300 or 400 feet away, to stop;

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that it continued going at about 15 or 20 miles an hour, hit the intestate, and came to a stop some 150 feet farther on. When the witness was further asked to tell about where in the street the intestate was when he held up his hand, and how near to the rails he was, he said that he could not tell. He was not inquired of as to the intestate's subsequent movements or conduct before he was struck, and he gave no information upon that subject. The intestate's position in the street was only a short distance south of the marked poles.

Other evidence bearing upon the question of the defendant's original negligence need not be recited.

Donald G. Perkins and Allyn Brown, for appellant.

Michael Kenealy, for appellee.

PRENTICE, J. (after stating the facts as above). [1] The plaintiff assumed the burden of establishing by a preponderance of evidence the defendant's negligence and her intestate's freedom from contributory negligence. If she failed to present, in support of each of these two propositions, substantial evidence which should be weighed and considered by the jury, and upon which it reasonably might have reached affirmative conclusions, the nonsuit was properly granted. *Booth v. Hart*, 43 Conn. 480, 484; *Foskett & Bishop v. Swayne*, 70 Conn. 74, 75, 76, 38 Atl. 893.

[2] The evidence presented must have been such as to furnish a more substantial basis for a conclusion than a mere guess, surmise, or conjecture. *Mesite v. Connecticut Co.*, 82 Conn. 403, 405, 74 Atl. 684; *Fay v. Hartford & Springfield Street Ry. Co.*, 81 Conn. 330, 335, 71 Atl. 364. The plaintiff was bound to remove the issues from the realm of speculation, and to establish facts affording a logical basis for the inferences which she claimed. *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 399, 71 Atl. 553.

[3] It may be assumed, in accordance with the plaintiff's contention, that evidence was presented from which the jury reasonably might have found the defendant negligent in the premises. It is clear that it could not have been so found that the plaintiff's intestate was free from contributory negligence. Plaintiff's counsel make no claim to the contrary. They rest their contention that a prima facie case was made out entirely upon an appeal to the doctrine of supervening negligence as recognized and defined in *Smith v. Connecticut Ry. & Ltg. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 17 L. R. A. (N. S.) 707; *Carroll v. Connecticut Co.*, 82 Conn. 513, 518, 74 Atl. 897, and *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 323, 76 Atl. 298.

A successful appeal to this doctrine imposes upon the plaintiff the duty of showing that the defendant's servant, the motor-

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man, failed to exercise reasonable care and prudence to save the intestate from harm after the peril of the latter became, or in the exercise of due care ought to have become, known to the former, when by the exercise of such care on the part of the former the intestate would not have been injured. *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 76 Atl. 298.

[4] A prima facie case, which rested upon this contention, could not be made out until evidence pertinent to this line of inquiry was adduced which furnished some basis for a conclusion more substantial than a guess or surmise. The conduct of the parties is to be considered, and its character as related to prudence determined, in view of the situation presented and with which the actors were respectively confronted. Until there was something substantial before the jury to enable its members to discover what these circumstances were, they would be left with nothing to afford them a reasonable guide in the inquiry they were called upon to make. This was the situation in which the plaintiff's evidence left her case as touching any claim of supervening negligence on the part of the defendant. What the circumstances demanded of the motorman for the intestate's protection depended upon the latter's position and movements at and after the time he signaled the car, then 300 feet or more away. Upon this vital point the evidence was wholly uninforming, beyond the fact that he was in the street when he gave his signal. There was 18 feet of roadway between the curb and the easterly or nearest rail. Where, in this width of street, and how near to the rail, he was at this time, the only witness to the occurrence which the plaintiff produced said that he did not know, and, as to the intestate's subsequent conduct or movements as the car approached, there was not a word of testimony, direct or circumstantial, beyond the fact that somehow and at some time he came into a position in close enough proximity to the rail to be struck. It may have been, for aught that appears, that he was not in a position of danger until the moment before he was hit. It may have been that the final act of negligence which was the proximate cause of the accident was that of the intestate in moving forward into a position of danger when the car was already upon him, and the motorman was helpless to avert the result. *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 325, 76 Atl. 298. It is possible to build up speculative theories, but they can rest upon no substantial foundation furnished by the evidence.

[5] It may be suggested that the failure of the motorman to turn off the searchlight when he saw, or ought to have seen, the intestate in the street intending to board the car, imports into the situation a factor which materially changes the situation. Of this claim it is to be noted, in the first place, that it carries

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the case entirely outside of the complaint, which charges no negligence arising from the use or operation of this light. Moreover, it is apparent, in view of the uncertainty in which the plaintiff left the situation as to the intestate's position and movements, that this claim can have no substantial basis, unless it be held that the failure, under all circumstances, to turn off such a light when a person ahead exhibits his intention to become a passenger, is negligent conduct in itself. For such a sweeping claim the evidence which the plaintiff produced, including that of her experts, furnished no substantial basis. In fact, the only expert to whom her counsel ventured to ask a question relating to this particular matter discountenanced any such practice in the case of persons preparing to board a car in the ordinary way.

There is no error. In this opinion the other Judges concurred.

WALTHER v. SOUTHERN PAC. CO.

(Supreme Court of California, May 18, 1911. On Rehearing in Bank, June 17, 1911.)

[116 Pac. Rep. 51.]

Carriers—Negligence—Exemptions from Liability—Special Rates.*

—A contract exempting a common carrier from liability for negligence causing injury to a passenger carried for any compensation is against public policy, though agreed to by the passenger in consideration of special concessions as to rates or otherwise.

Carriers—Negligence—Exemptions from Liability—Gratuitous Carriage.*—A contract of exemption from liability to a passenger for injuries resulting from negligence, except willful, wanton, or gross negligence, is valid as to a passenger carried solely as a matter of favor, and without any compensation or advantage to the carrier.

Carriers—Negligence—Contract of Exemption—Public Policy—Statutory Provisions.—Civ. Code, § 2175, providing that a common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for gross negligence, fraud, or willful wrong of himself or servants, prevents a carrier from contracting against liability for the character of negligence referred to in the statute, as against one who is carried without any compensation whatever.

Carriers—Who Are Passengers.†—Upon whatever terms a com-

*See foot-note of *Miley v. Northern Pac. Ry. Co.* (Mont.), 36 R. R. R. 176, 59 Am. & Eng. R. Cas., N. S., 176.

†For the authorities in this series on the question whether a person may be a passenger without paying for transportation, see first foot-note of *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 32 R. R. R. 463, 55 Am. & Eng. R. Cas., N. S., 463.

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mon carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists.

Carriers—Compensation—Waiver.—The voluntary waiver of all claim for compensation for carriage of a person does not take away the status of common carrier with respect to such person.

Carriers—Limitation of Liability—"Gross Negligence"—"Slight Care."—Civ. Code, § 2175, prohibiting a carrier from limiting its liability for injuries resulting from gross negligence, was a part of Civ. Code 1872, which by sections 16 and 17 declared that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance, and "gross negligence" was defined as that which consists in the want of slight care and diligence. These sections were repealed in 1874. Held, that such repeal cannot affect the construction of the words "gross negligence" as used in section 2175, as the intention of the Legislature at the time of the adoption of the latter section must control, and there is no warrant for holding that such words were intended to mean other than as the term is defined in the repealed sections.

Appeal and Error—Review—Question of Fact.—The appellate court cannot disturb the conclusion of the trial court based on evidence legally sufficient to warrant the inference drawn.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Carrie E. Walther against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. McKinley (*W. R. Miller*, of counsel), for appellant.

L. M. Sprecher and *Frank T. Bates*, for respondent. *Warren Olney, Jr.*, and *Alexander R. Baldwin*, *Amici Curiae*.

ANGELLOTTI, J. The plaintiff is the widow of one Henry F. Walther, who, while being carried on a passenger train of defendant on March 28, 1907, was killed by reason of the derailment of such train and the consequent wrecking and demolition of the car in which he was being carried. The accident occurred in defendant's yard at Colton in San Bernardino county, and was caused by the train on which deceased was riding running from the main track into an open switch at a high rate of speed, estimated by the trial court to be between 45 and 55 miles an hour, when, being unable to traverse the curve of the sidetrack, it was derailed. The switch had been left open by the switch foreman, who, with his crew, were working on the siding at the time, and who had neglected to keep himself ad-

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vised of the whereabouts of the train, which was long overdue, and had left the switch open in violation of the rules of the defendant. Deceased was an employee of defendant, but at the time of the accident and for some months next preceding the same was absent on leave. At the time of the accident he was returning from a journey to an Eastern state to his home in California. He was riding on a pass, good until March 31, 1907, which had been issued to him by defendant for the purposes of his journey. It was found by the trial court, in accord with a stipulation of the parties, that the pass was issued to him as an employee, "in accordance with the long established practice of the company, and one well known to its employees, to furnish passes from time to time to its employees." There was no other consideration for such pass. It contained the following statements, subscribed by the deceased: "This is a free pass based upon no consideration whatever. The person accepting and using this pass, in consideration of receiving the same, agrees that the Southern Pacific Company shall not be liable under any circumstances, whether of negligence—criminal or otherwise—of its agents or others, for any injury to the person, or for any loss or damage to the property of the individual using this pass; and that as to such person the company shall not be considered as a common carrier, or liable as such." This action was brought by plaintiff to recover the damage caused her by the death of her husband, being based upon section 377, Code of Civil Procedure, which provides that, when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such person. In her complaint she alleged that the accident and the consequent death of deceased were caused by the "gross negligence" of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. Damages were assessed at the sum of \$8,000, and judgment was given in favor of plaintiff for that amount. This is an appeal by defendant from such judgment. The record on appeal was filed in this court on March 29, 1910.

The ultimate question presented by this appeal is whether the provision in the pass purporting to exempt defendant from liability for the negligence of its agents precludes a recovery under the circumstances of this case.

[1] Independent of statutory provisions, it is almost universally held that any contract purporting to exempt a common carrier of persons from liability for negligence of himself or his servants to a passenger carried for compensation is void, as being against public policy, and it is immaterial in such cases

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that the attempted limitation on such liability is agreed to by the passenger in consideration of special concessions in the matter of rate of fare or other departure from the rules applicable to passengers paying full fare. It is enough that there is any consideration for the carriage.

[2] The person admitted to his vehicle by a common carrier for the purpose of carriage for any compensation is a passenger, with all the rights possessed by any passenger so far as the exercise of care for his safe carriage is concerned. By the great weight of authority, however, in the absence of provision to the contrary, such a contract of exemption from liability for negligence is upheld, at least so far as any except what is called in the opinions wanton or willful or gross negligence is concerned, in the case of a passenger who is carried solely as a matter of favor, and without any compensation or advantage whatever to the carrier. See *Northern Pacific R. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Kinney v. New Jersey, etc., R. R. Co.*, 32 N. J. Law, 407, 90 Am. Dec. 675; *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901; *Payne v. Terre Haute, etc., Ry. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472.

[3] We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175, Civil Code, provides: "A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." Aside from the question of the meaning of the term "gross negligence" as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168, Civil Code, contained in the same chapter, which is entitled "Common Carriers in General," declares that "every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry," and, of course, the defendant was under this definition a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these requirements

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on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

[4] But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See *Rogers v. Kennebec Steamboat Co.*, *supra*. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern Pacific Co.*, 114 Pac. 982, a mere trespasser on the vehicle.

[5] The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but section 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

[6] This brings us to a consideration of the question of the meaning of the term "gross negligence," as used in section 2175 Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from "gross negligence" of the defendant or its servants, within the meaning of the term "gross negligence," as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of willful wrong, and do not include anything in the nature of a mere omission to exercise care without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopted in the year 1872. This Code contained two sections declaring that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that "which is such as persons of ordinary prudence

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usually exercise about their own affairs of slight importance," and "gross negligence" was defined as that "which consists in the want of slight care and diligence." Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words "gross negligence" in section 2175, Civil Code, as it is the intention of the Legislature at the time of the adoption of the latter section that must control.

We see no warrant for holding that the term "gross negligence" as used therein was intended to mean other than the "gross negligence" defined in section 17 of the same act "to establish a Civil Code," which was simply "the want of slight care and diligence." This must necessarily have been the view of this court in *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, 766, 91 Pac. 603, 11 L. R. A. (N. S.) 811, for an examination of the record shows that there could have been no other ground for the expression of opinion "that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of." It was also recognized in *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 589, 63 Pac. 915, upon evidence that was utterly destitute of anything in the nature of a showing of willful or wanton wrong, that the question whether or not the common carrier was guilty of gross negligence was one for the jury to pass upon under proper instructions. But regardless of these expressions of opinion, both of which were made under such circumstances that they may reasonably be claimed not to constitute binding authority on the question, we are satisfied that the definition of the "gross negligence" of section 2175, Civil Code, must be found in sections 16 and 17 of the Civil Code, as the same were adopted in 1872.

[7] Accepting this definition of gross negligence, it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants. The question of the existence of such gross negligence was one for the trial court, and, the facts being legally sufficient to warrant the inference drawn, an appellate court cannot properly disturb the conclusion reached by that tribunal.

The conclusion we have arrived at upon the points already discussed renders it unnecessary to consider other questions argued in the briefs, and compels an affirmance of the judgment.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

DENVER CITY TRAMWAY CO. v. COWAN.

(Supreme Court of Colorado, June 5, 1911.)

[116 Pac. Rep. 136.]

Carriers—Injury to Passenger—Evidence—Similar Accident.*—In an action for injuries to a street car passenger by being thrown from a car while he was endeavoring to board the same, evidence that on the same evening witness was thrown from another car on the same line one block west of the point where plaintiff's accident occurred, in practically the same manner by the car being started too quickly, was inadmissible and prejudicial; evidence of other acts being competent only when offered to establish a previous and defective condition of a thing, and knowledge or notice thereof by the party sought to be charged, or to charge defendant with notice of another's incompetency, etc.

Carriers—Injuries to Passenger—Other Similar Acts.*—In an action for injuries to a street car passenger, by the sudden starting of the car as he was attempting to board it, evidence of a similar accident to witness on the same evening at about the same place was inadmissible under a count charging a willful injury.

Appeal and Error—Harmless Error—Admission of Evidence—Curing Error—Withdrawal.—Where two causes of action are separate and distinct, or the facts of one are not interwoven with the facts of the other, the withdrawal of the cause of action to which alone evidence erroneously admitted applies will cure the error; but where evidence wholly inadmissible is as applicable to one cause of action as to the other, or is of such a character that the court cannot say it had no influence in the determination of the issues submitted, the mere withdrawal of one of the causes of action it was offered to support will not cure the error.

Appeal and Error—Evidence—Prejudice—Presumptions.—Where illegal evidence is introduced and allowed to go to the jury over objection and exception, the error is presumed prejudicial to the party excepting, unless it affirmatively appears to the contrary.

Damages—Personal Injuries—Pleading and Proof.—A general allegation of injury or sickness as an element of injury resulting from an accident is sufficient to justify proof of injury to a particular muscle, and also that plaintiff suffered an attack of pleurisy by reason thereof.

Damages—Personal Injury—Pleading and Proof—Particulars.—Where a plaintiff alleges the nature of his injuries and the particulars thereof, he is not entitled to offer proof of injuries not specified.

*See first foot-note of *Washington, etc., Ry. Co. v. Trimyer (Va.)*, 37 R. R. R. 114, 60 Am. & Eng. R. Cas., N. S., 114; last head-note of *Missouri, etc., Ry. Co. v. Williams (Tex.)*, 35 R. R. R. 770, 58 Am. & Eng. R. Cas., N. S., 770; second foot-note of *American Ice Co. v. Pennsylvania R. Co. (Pa.)*, 33 R. R. R. 535, 56 Am. & Eng. R. Cas., N. S., 535.

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Damages—Personal Injuries—Evidence.—In an action for injuries, evidence that plaintiff since the injury had been unable to attend to the business in which he had been engaged, or to any business, was competent to show the extent and permanent nature of the injury sustained.

Carriers—Injury to Passenger—Experience of Servants.—Where plaintiff was injured while attempting to board a street car by the sudden starting thereof, the fact that defendant had manned the car with reckless, inexperienced, and inattentive servants would not alone give plaintiff a cause of action, nor would the fact that the car was in charge of careful, prudent, and experienced servants release defendant from liability for injuries sustained through its negligence alone.

Carriers—Injury to Passenger—Trial—Separate Causes of Action—Withdrawal.—An instruction, that the only allegation of negligence supported by the evidence and to be determined as a fact by the jury was whether the car which plaintiff attempted to board at the time he was injured was stopped and started again while plaintiff was attempting to board it, sufficiently withdrew charges in the complaint that the carrier was responsible for the injury because it had manned the car with servants who were reckless, inexperienced, and inattentive to their duties, and that, in trusting such servants to operate the car, defendant was negligent, etc.

Trial—Requested Instructions—Instructions Already Given—Credibility of Witnesses.—Where the court charged that the jury must consider the interest of the witnesses in weighing their testimony, the court did not err in refusing to charge that in considering plaintiff's evidence the jury should bear in mind that he was the plaintiff and interested in the result of the suit.

Carriers—Injuries to Passengers—Instructions.—In an action for injuries received by the starting of a street car while plaintiff was boarding it, an instruction that if the jury believe from a preponderance of the evidence that certain facts enumerated as set forth in the general allegations of the complaint occurred, and that such conditions resulted solely from the negligence of the servants of defendant carrier as charged, then plaintiff was entitled to recover, confined the jury to a consideration of the facts and circumstances relating to plaintiff's attempt to board the car, and the manner of its starting, and the injury sustained as alleged in the complaint, and was not objectionable either as failing to confine the jury to a consideration of the facts of negligence charged and sustained by the evidence, or as withdrawing from the jury the question whether defendant's act in starting the car under the circumstances was negligent.

Damages—Instructions—Measure of Damages.—In an action for injuries to a street car passenger while attempting to board a car, an instruction that the measure of damages could not be accurately measured in money, but that money was the only measurement

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known to the law in such case, that in measuring the damages the jury should consider plaintiff's age, expectancy of life, physical and mental pain, the probability of its continuance, the nature and extent of the injuries as they severally appeared in the evidence, and from all the facts and circumstances determine what amount would be fair compensation for the injuries sustained and determine the amount according to their enlightened judgment, was not erroneous for failure to limit the jury's determination of the damages to those shown by a preponderance of the evidence.

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Edwin R. Cowan against the Denver City Tramway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Gerald Hughes and Howard S. Robertson, for appellant.
Richardson & Hawkins and Stephen W. Ryan, for appellee.

WHITE, J. Appellee, as plaintiff below, sued the appellant and recovered judgment in damages for personal injuries sustained while attempting, as a passenger, to get upon a street car then owned and operated by the latter, upon the public streets of the city of Denver. From the judgment, the defendant company appeals.

The original complaint stated the facts as constituting one cause of action. A motion, interposed by defendant to "separate, and separately state, the two alleged and pretended causes of action," was sustained, and thereupon appellee filed an amended complaint. Omitting the formal parts thereof, it is alleged, substantially, as a first cause of action, that plaintiff, desiring to board one of the cars of the defendant at Fifteenth and Platte streets, signaled an incoming car traveling along Fifteenth street; that the car, in obedience thereto, came to a stop; that thereupon plaintiff attempted to board the same, and as he was in the act of getting on, and before he could land, the car was suddenly and violently started by defendant, and thereby plaintiff was thrown therefrom across, over, and upon the street, and by reason thereof his right clavicle was broken and contused, and the flesh, muscles, and tissues surrounding the same were greatly injured, the neck of the right femur was broken, and the flesh, muscles, and tissues surrounding the same were greatly injured, lacerated, and torn, and his body was severely bruised, beaten, and wounded, whereby and by reason of which he was compelled to, and did, keep his bed for a period of 12 weeks, during which time he suffered immeasurable pain, anguish, and distress, and was permanently injured and disabled. And further: "That the said injuries occurred and were brought about wholly by rea-

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son of the negligence of the said company in each and every, all and singular, of the following particulars, to wit: (a) That the said company should not have caused its said car to be started until this plaintiff had fully gotten onto the said car, and into a place of safety thereon. (b) That the said company should not have started its said car in any event so violently, hurriedly, and rapidly as it did start the said car. (c) That the said car was started at a time and under the circumstances hereinbefore detailed in disregard of the safety of the lives and limbs of the passengers who were about to board said car, and particularly of the life and limbs of said plaintiff. (d) That the servants of the said company who were responsible for the operation of said car were reckless, inexperienced, and inattentive to their duties, all of which was known to, or in the exercise of reasonable diligence would have been known to, said company. (e) That, in trusting the said servants to operate the said car, the said defendant was guilty of neglect thereby endangering the lives and limbs of the passengers on said car, in the operation thereof, and particularly the life and limbs of this plaintiff."

The second cause of action, in its formal parts and in the alleged manner in which the accident occurred, was identical with the first, but particularized as follows: "(a) That the said company wantonly and recklessly caused its said car to be started before this plaintiff had fully gotten onto the said car and into a place of safety thereon. (b) That the said company started its car wantonly, recklessly, violently, hurriedly, and so hastily and rapidly as to endanger the life and limbs of this plaintiff, by reason of which he suffered the injuries as aforesaid. (c) That the said car was started at a time and under circumstances showing a wanton and reckless disregard of the safety of the lives and limbs of the passengers who were about to board said car, and particularly of the life and the limbs of this plaintiff. (d) That the servants of the said company who were responsible for the operation of said car were reckless, inexperienced, and inattentive to their duties, all of which was known to, or in the exercise of reasonable diligence would have been known to, said company, and which it wantonly and willfully countenanced in continuing the said servants in its said employment. (e) That in trusting the said servants to operate the said car the said defendant was guilty of wanton and inexcusable neglect in endangering the lives and limbs of the passengers on said car in the reckless operation thereof, and particularly the life and limbs of this plaintiff."

Upon motion of defendant, and order of the court thereon, the plaintiff filed a bill of particulars as to the portions of his body "bruised, beaten, and wounded."

The defense interposed, denied the alleged negligence of defendant, and the injury sustained by plaintiff, and pleaded contributory negligence on the part of the latter.

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The evidence on behalf of plaintiff was to the effect that the car came to a full stop in obedience to his signal, but before he had an opportunity to board the same, and while in the act thereof, the car started forward, and he was thrown to the pavement and received the injuries set forth in the complaint. That of defendant tended to show that the accident occurred while plaintiff was attempting to board a car which was in rapid motion, and which had not stopped, after crossing the intersecting street, where plaintiff attempted to get on. The court, in its instructions, dismissed the second cause of action, and directed the jury to confine itself to consideration of the first.

1. The first assignment of error argued pertains to the reception of alleged improper evidence on behalf of plaintiff, and the rejection of alleged proper evidence offered on behalf of defendant.

[1] A witness for plaintiff was permitted to testify, over the objection and exception of defendant, concerning an accident which occurred to him a few minutes before the one in question. The substance of this testimony is that, on the evening of the accident, witness, for the purpose of taking a car into the city, went to the junction of Central and Fifteenth streets, which is one block west of the point where the accident to plaintiff occurred; that a car came to where he was waiting and stopped, and thereupon witness undertook to get upon the same, but before he could do so the conductor rang the bell, and the car started forward, with a jerk, and threw witness therefrom. Then the following question and answer: "Q. What became of you? A. I rolled off about 15 feet to one side of the car. That is what became of me then and there."

The general rule is that, when a party is sued for damages arising from a particular act of negligence imputed to him, disconnected, though similar, negligent acts, are inadmissible. A different rule applies when the purpose of the evidence is to establish a previous and continuous defective or dangerous condition of a thing, and knowledge or notice thereof upon the part of the person sought to be charged, or, perhaps, when its purpose is to charge one with notice of another's incompetency, and probably, in a few other instances, not necessary to notice here. *Rio Grande Southern R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986; *Colo. Mtg. & In. Co. v. Rees*, 21 Colo. 435, 43 Pac. 42; *Last Chance M. & M. Co. v. Ames*, 23 Colo. 167, 173, 47 Pac. 382; *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 348, 351, 38 Pac. 608; *Wigmore on Evidence*, §§ 199, 208, 250.

In *Wigmore on Evidence*, § 199, after stating that "in a few jurisdictions the character of a defendant or of an employee or of a plaintiff for negligence or prudence may be used to show that he probably was not or was careful on a given oc-

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casion," the author puts the question, "Is it proper to evidence that character by particular instances of the trait?" and, after stating the argument negating the proposition, proceeds: "For these reasons, almost all courts exclude such evidence, whatever their views may be * * * as to the propriety of using the character, if otherwise evidenced, to show the probability or improbability of carelessness on a particular occasion." The author then states the rule permitting the use of single acts for the purpose of establishing notice of incompetency, and proceeds: "This is not inconsistent with rejecting particular acts as evidence of the objective fact of incompetency."

In the case at bar, neither the condition of the car nor the incompetency of the servants is involved. The plaintiff could recover only by showing that the servants of defendant in charge of the car were guilty of negligence, resulting in his injuries at the time and place alleged. The only way in which to establish such negligence was by showing that such servants, then and there started the car without giving plaintiff sufficient time to safely board the same. Indeed, that is the only issue made by the pleadings or sought to be sustained by the evidence. If defendant's servants were not negligent at the time plaintiff sustained the injuries of which he complains, it was wholly immaterial how habitually and recklessly negligent they might have been prior thereto; or, if they were negligent then, how careful and prudent they had previously been. The incompetency of the servants, and notice thereof on the part of defendant, because of the nature of the case, were wholly immaterial, and the case must necessarily be determined under the general rule.

The irrelevancy, immateriality, and prejudicial effect of the evidence in question is readily apparent. It presented collateral matters, drew away the minds of the jurors from the points in issue, and had a tendency to confuse and mislead them, instead of informing them upon the direct issue they were to consider and pass upon. If such evidence be permissible, controversial proofs would necessarily be essential, and there would be as many collateral issues as there were separate accidents shown, and litigation, in any given case, would become interminable. Moreover, the defendant, unadvised of what particular alleged negligent acts might be presented, would be in no position to meet the same. Furthermore, if the jury believed that defendant's servants, at the intersection of the streets a block away, started the car before the witness had an opportunity to board the same, and caused him to be thrown therefrom, it would be a circumstance of great weight, and almost controlling force, in convincing them that such servants likewise so started the car at the place and time in question and caused plaintiff to be thrown. The cases hereinbefore cited, from our own courts, sustain the rule we have here announced. However, we will

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refer to a few cases analogous in principle, from other jurisdictions.

The case of Delaware, Lackawanna & Western R. Co. v. Converse, 139 U. S. 469, 477, 11 Sup. Ct. 569, 572 (35 L. Ed. 213), was for the recovery of damages on account of personal injuries sustained, and it is therein stated: "Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks, between 6 and 7 o'clock in the evening, on his way from Jersey City to the County Farm, showed negligence upon his part. Plainly, this evidence was irrelevant. It did not, in any wise, illustrate the issue as to whether the defendant was guilty of negligence, or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the County Farm, attempted to cross the railroad tracks."

In Maguire v. Middlesex R. Co., 115 Mass. 239, 240, it is said: "The only error that occurred in the trial in the court below was in the admission of the testimony that the driver had been seen on several previous occasions to stop the car suddenly. The plaintiff's complaint was that in consequence of a sudden stop he was thrown from the platform, and injured by being run over. The question for the jury, supposing he had satisfied them that he was in the exercise of due care, was as to the exercise of the like degree of care on the part of the defendant at the time of the accident. The fact that the same driver had at some other times been guilty of careless or unskillful management could have no legitimate bearing upon the question as to the care or skill exhibited at the time in controversy." Robinson v. F. & W. R. Co., 7 Gray (Mass.) 92, 95; C., R. I. & P. Ry. Co. v. Durand, 65 Kan. 380, 69 Pac. 356; Little Rock & M. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Dalton v. C., R. I. & P. Ry. Co., 114 Iowa, 257, 86 N. W. 272; C., B. & Q. R. Co. v. Lee, 60 Ill. 501, 504.

[2] Plaintiff maintains that this evidence was admissible under his second cause of action, which he asserts "charged wantonness and recklessness in the particular negligence;" and contends that as the second cause, by an instruction of the court, was withdrawn from the consideration of the jury, the evidence was likewise withdrawn, and no error intervened.

[3] It is not at all certain that the complaint states two causes of action. However, were we to assume that the alleged second cause of action sufficiently charges willfulness and wantonness in the sense of a willful or intentional act, the evidence was, nevertheless, inadmissible. If such evidence be proper in any given case, it is, as we have heretofore stated, to establish a condition of a thing, or charge one with notice, either of defects, conditions, or incompetency, none of which questions are

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involved in this case. It is quite true that when two causes of action are separate and distinct, or the fact of one are not interwoven with the facts of the other, the withdrawal of the cause to which alone the evidence applies will necessarily withdraw the evidence in support thereof. But where evidence wholly inadmissible is placed before a jury, and is as applicable to one cause as to the other, or is of such character and nature that the court is unable to say it had no influence upon the jurors in the determination of the issues, the simple withdrawal of the cause, under which the objectionable evidence is claimed to have been admitted, cannot remove the evil effect thereof, and the judgment must be reversed.

The evidence in question comes clearly within the last-stated rule. In each of the supposed causes of action, it is alleged that the agents and servants in charge of defendant's car were reckless, inexperienced, and incompetent, and that defendant had knowledge thereof. Moreover, the objectionable evidence went before the jury without the court in any wise limiting its purpose or effect. When defendant interposed objections to the evidence, counsel for plaintiff simply remarked that it was offered under the second cause of action. The court made no ruling other than to admit the evidence. No limitation was given that, in the opinion of the court, the evidence was applicable to the alleged second cause of action only. Whether an instruction, specifically withdrawing the evidence from the jury, would have removed its evil effect, need not be here considered, as there was no such instruction given.

[4] Where illegal evidence is introduced and placed before a jury, over the objection and exception of one of the parties, the error is presumed prejudicial to the party excepting thereto, unless it affirmatively appears that it was not. In a case involving this principle (*D. S. P. & P. R. Co. v. Wilson*, 12 Colo. 20, 26, 20 Pac. 340, 343) we said: "It is impossible to say that the admission of this testimony was error without prejudice; it may have been the very thing that induced the jury to find negligence on the part of defendant." Presumably every error is prejudicial to the party against whom it is committed, and the presumption cannot be overcome until it appears, beyond doubt, that the error did not and could not have prejudiced the party's rights. *Rio Grande Southern R. R. Co. v. Campbell*, supra, is peculiarly applicable to the facts of this case. There one of the questions was whether the particular cars between which plaintiff was injured in attempting to couple them were engaged in moving interstate traffic. Plaintiff, over objection, was permitted to introduce testimony to prove that defendant frequently received from, and delivered to, connecting lines, passengers and freight which had come from, or were destined to, points without the state. In the progress of the case, it

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was determined that the act of Congress, requiring common carriers engaged in interstate commerce to equip the cars with automatic couplers, was not involved. Thereupon the trial court undertook to cure the error in the admission of the evidence, by instructing the jury to the effect that the congressional act was not involved, and that no liability of the defendant to the plaintiff could be predicated upon the violation thereof by the former. In holding that the instruction did not cure the error, it is said: "The tendency of the testimony under consideration would be to influence the jury in favor of the plaintiff, and must, therefore, be regarded as having this effect, unless it clearly appears that the defendant was not prejudiced thereby. * * * The rights of litigants can only be preserved by adhering to this rule. Cases should be tried before a jury on competent testimony, and, when a party insists in getting before them testimony which is incompetent, he does so at his peril, and thereby has imposed upon him, when the case is reviewed, the burden of showing that the jury was not influenced in his favor thereby."

And, after stating that the testimony bearing on the subject of the negligence of the defendant was close, it is further said: "When the jury were advised that the defendant had engaged in interstate commerce, and that an act of Congress required railroads so engaged to equip their cars with automatic couplers, it is impossible to tell to what extent it may have influenced the jury in rendering its verdict, or to what extent, when it happened that the cars between which plaintiff was injured were not equipped with automatic couplers, it may have created a prejudice in the minds of the jury which prevented them from giving that careful consideration to the competent testimony bearing on the subject of the defendant's negligence which they should."

So in the case at bar. The material issue involved was whether the servants of defendant were negligent in starting the car before the plaintiff had gotten aboard thereof, and evidence tending to prove that, at other times and places, such servants were negligent in regard to starting the same or other cars, was not admissible, and, moreover, was highly prejudicial to defendant's rights.

The plaintiff was permitted to testify that the sartorius muscle was sore from the effects of the injury, and by reason thereof he was unable to bear any weight upon his leg. A physician was also permitted to testify that plaintiff developed pleurisy as a result of the injuries occasioned by the accident. It is contended that the testimony in each instance constitutes reversible error. It is argued that the evidence was not admissible under the pleadings and bill of particulars. The complaint alleged that "the neck of the right femur of the plaintiff was broken, and the flesh, muscles, and tissues surrounding the same were

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very greatly injured, lacerated, and torn, and the body of this plaintiff was severely bruised, beaten, and wounded." The bill of particulars described in technical language certain bones broken and wrenched, muscles and tissues lacerated and torn, but did not designate the sartorius muscle. The particular injuries resulting from the principal one were specified in the complaint or bill of particulars, but do not include pleurisy, unless covered by the general allegation of pain.

[5] A general allegation of injury, or sickness as an element of injury, resulting from an accident, is sufficient to let in proof of the character here under consideration. *Montgomery v. Lansing*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287.

[6] Nevertheless, when a plaintiff alleges what his injuries are, and the particulars thereof, he cannot be permitted to offer proof of injuries in no wise specified. *Arnold v. City of Maryville*, 110 Mo. App. 254, 260, 85 S. W. 107. Without applying the rules stated, and testing the complaint thereby, we suggest that it would be safer, upon another trial, for plaintiff to amend his pleadings and broaden his bill of particulars to meet the objections urged. We do not wish to be understood, however, as holding that, under the allegations of the complaint, the defendant was entitled to a bill of particulars, or that, without amendment, the particular evidence could properly have been received.

[7] Plaintiff was permitted to testify that since the injury he had been unable to attend to the business (not naming it) in which he had been engaged prior thereto, or to attend to any business. It is argued that this evidence was improper, under the pleadings, as the damage occasioned by the loss of time, or interference with the business of plaintiff, was necessarily special. There was no error in receiving the evidence. It was proper for the purpose of showing the extent, or permanent nature, of the injury sustained. *C. S. & I. Ry. Co. v. Nichols*, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215; *City of Denver v. Human*, 9 Colo. App. 144, 47 Pac. 991.

2. Defendant tendered an instruction, to the effect that the plaintiff had failed to prove the allegations in subdivisions (d) and (e) of his complaint, and requested the modification, to the same effect, of instruction No. 1 given by the court. The tendered instruction, and the modification requested, were refused, and the action of the court thereon is assigned as error. There was no evidence to support the allegations in question.

[8] If defendant had manned its car with reckless, inexperienced, and inattentive servants, that alone would not have given plaintiff a cause of action; nor would the fact, if it be a fact, that the car was in charge of careful, prudent, and experienced servants, relieve the defendant from liability for injuries sustained through its negligence alone. The matters of expe-

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rience or inexperience, or reckless or prudence, are in no wise involved. The case as made by the evidence, if not by the pleadings, was simply one of negligence or nonnegligence, and should have been so limited. *D. & R. G. R. R. Co. v. Scott*, 34 Colo. 99, 106, 81 Pac. 763.

[9] Therefore the instruction requested should have been given, and the modification made, unless the effect thereof was covered by other instructions. We are inclined to think this was done. Instruction No. 7 expressly told the jury "that the only allegation of negligence which is supported by the evidence, and which is to be determined as a fact by you, is whether or not the car was stopped, and started while the plaintiff was attempting to board it."

[10] The next alleged error we consider necessary to notice is the refusal of the court to give instruction No. 5 requested, to the effect that, in considering plaintiff's evidence, the jury should bear in mind that he was the plaintiff and interested in the result of the action. Thought it was different at common law, under the statute, a plaintiff occupies exactly the same position as any other witness in a given case as to the weight to be given his evidence. The jury, in determining the weight of the testimony of each and all, have the right, and it is their duty, to take into consideration the interest which any witness, whether a party to the record or not, has in the subject-matter involved in the litigation, and it is the duty of the court to so instruct. *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *Stewart v. Kindel*, 15 Colo. 539, 543, 25 Pac. 990.

This, however, was done in the case at bar. The jury were told that they must take into consideration the interest of the witnesses in weighing and extending credibility to their testimony. This applied to all witnesses, including the parties to the suit. The practice of singling out witnesses in an instruction, where the credibility of others testifying in the case may also be affected by their interest, has frequently been criticised by the courts. In *Phenix Insurance Co. v. La Pointe*, 118 Ill. 384, 389, 8 N. E. 353, 354, the requested instruction, "that the plaintiff, La Pointe, and the mortgagee, Hartman, are both interested in the event of the suit, and that, while said interest does not render them incompetent as witnesses, it goes to their credibility as such," was refused, and error assigned thereon. In overruling the assignment, it is said: "The instruction under consideration, if given, would give undue prominence to facts alleged as operating to discredit appellee's witnesses, while it ignored corresponding causes alleged to affect the credibility of witnesses for appellant."

In *Pennsylvania Company v. Versten*, 140 Ill. 637, 642, 30 N. E. 540, 541 (15 L. R. A. 798), in passing upon a similar request, it is said: "The thirteenth (instruction) asked by appellant, to

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the effect that the jury might take into consideration the plaintiff's interest in the result of the suit, was properly refused, because in directing the jury to apply the test of interest in weighing the testimony, it singled out the plaintiff; whereas the same test was applicable to other witnesses in the case. * * * Under the rules of evidence, in weighing the testimony of witnesses certain tests are properly applied, and, if asked to do so in a proper instruction, it is the duty of the court to tell the jury what those tests are. By our statute, interest on the event of a suit, as a party or otherwise, does not disqualify a person as a witness, but such interest may be shown for the purpose of affecting his credibility. That test, when applied, must extend to all witnesses alike who are interested, either as parties, agents, or servants of parties, or otherwise."

Some authorities are cited which lend to support the contention of defendant. It appears however, in each case the success of the plaintiff, upon the vital point in the case, depended solely on the plaintiff's own testimony, and, in most, it is not certain that any instruction covering the question of interest, as affecting the credibility of witnesses, had been given. Not so in the case at bar. Other witnesses testified substantially as did plaintiff, and instruction No. 13 particularly called the attention of the jury to the question of interest as affecting the credibility of witnesses and the weight to be given their testimony. The instruction given is the general one which has been uniformly used and approved in this state, and, under the circumstances of this case, was sufficient.

[11] By instruction No. 3 the jury were advised that if they believed from a preponderance of the evidence that certain facts and things (enumerating them, substantially), as set forth in the general allegations of the complaint, occurred, "and that these conditions were brought about and resulted solely from the negligence of the servants of the company, as charged in the complaint, then and in that event the plaintiff is entitled to recover a verdict at your hands for damages for the injuries so sustained.

Two objections are urged against the instruction. It is claimed that it does not confine the jury to a consideration of the specific acts of negligence charged and sustained by the evidence, but permits them to consider any and all alleged in the complaint. We think counsel has misconceived the scope of the instruction. It covers only, and thereby confines the jury to a consideration of, the facts and circumstances relating to plaintiff's attempt to board the car, and the manner of its starting, and the injury sustained. It is further claimed that the instruction took away from the jury the determination of the question whether the act of the defendant in starting the car, under the circumstances shown by the evidence, was a negligent act. We are not impressed with defendant's contention,

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nor are the authorities cited in support thereof in point. Whether or not defendant was guilty of negligence was necessarily a question for the jury, under all the facts of the case. But they were expressly told that, before they could find for plaintiff, they must believe from a preponderance of the evidence "that these conditions (enumerated) were brought about, and resulted solely from the negligence of the servants of the company." Not so in the cases cited. In each of those the jurors were advised that, if certain things occurred, they should return a verdict for plaintiff, without being required to find, as a condition precedent, that such things resulted solely from the negligence of the defendant.

[12] Defendant contends that instruction No. 4, as to the measure of damages, is erroneous. It is claimed that the instruction eliminates the fact that the jury must determine, from a preponderance of the evidence, the amount that should be awarded in compensation for the injury, pain, and suffering endured by plaintiff, but left such matter solely to their "enlightened judgment;" and, further, that it erroneously characterizes money as an inadequate compensation for such injuries. The jury were told that "the measure of damages in a case of this kind cannot be accurately measured in money, but the money is the only measurement known to the law in such case." They were then, in effect, told that the amount to be awarded, if they found for the plaintiff, was "left to the enlightened judgment of the jury;" and that, in measuring such damages, they were to consider the age of the plaintiff, his expectancy of life, his physical pain and suffering, the mental anxiety, anguish, and distress he had endured, the probability of its continuance, the nature and extent of the injury, as they severally appeared in evidence, and from all those facts and circumstances, determine what would amount to a fair compensation to the plaintiff on account of the injuries sustained. The instruction might have been clearer, yet we think it is substantially the same as that approved in *D. C. T. Co. v. Martin*, 44 Colo. 324, 98 Pac. 836.

There are other alleged errors argued, which we deem unnecessary to consider. The points discussed and determined herein are the only ones we deem of importance, except one pertaining to alleged improper remarks of counsel in his closing argument to the jury, which will unlikely arise again.

The briefs filed cover approximately 600 pages, cite nearly 400 authorities from foreign jurisdictions, and 56 from this state or a total of more than 450. Upon this feature of the case we refrain from comment. A statement of the facts alone is sufficient.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

CAMPBELL, C. J., and GABBERT, J., concur.

CENTRAL KENTUCKY TRACTION CO. v. COMBS.

(Court of Appeals of Kentucky, May 9, 1911.)

[136 S. W. Rep. 1045.]

Carriers—Personal Injuries—Starting Street Car While Passenger Is Alighting.*—A street railroad company is liable to a passenger for personal injuries, where the passenger undertakes to alight from its car after it has stopped, and where its employees know, or by the exercise of ordinary care should know, that the passenger was to leave the car, and while plaintiff was alighting from the car, the company, and without notice to the plaintiff, causes the car to suddenly start forward, thereby causing the passenger to be thrown and injured.

Carriers—Personal Injuries—Actions—Issues on Pleadings—Evidence.—Where the petition of plaintiff, in an action against a street railroad for personal injuries, alleged as defendant's only negligence the sudden starting up of the car, after it had stopped and while plaintiff was alighting, an instruction on contributory negligence that, if the plaintiff attempted to alight from defendant's car while it was in motion and running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care ought not to have attempted to alight, he could not recover, is erroneous, since it inferentially permits plaintiff to recover on a ground not averred by the petition.

Appeal and Error—Review—Parties Entitled to Allege Error—Error Committed by Party Complaining.—A party cannot complain of an instruction given at the trial if it is substantially the same as one asked by himself.

Appeal from Circuit Court, Franklin County.

Action by Mamie J. Combs against the Central Kentucky Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hazlrigg & Hazlrigg, for appellant.

Greene & Van Winkle, *C. B. Schoolfield*, and *Leslie W. Morris*, for appellee.

CARROLL, J. The appellee brought this suit against the ap-

*For the authorities in this series on the duty to give passengers time to alight, see last foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556.

For the authorities in this series on the subject of negligence in starting a street car while a passenger is attempting to board car, find a seat, or alight, see last foot-note of *Nolan v. Newton St. Ry. Co.* (Mass.), 38 R. R. R. 378, 61 Am. & Eng. R. Cas., N. S., 378; first foot-note of *Knuckley v. Butte Elect. Ry. Co.* (Mont.), 37 R. R. R. 757, 60 Am. & Eng. R. Cas., N. S., 757; second foot-note of *Orth v. Saginaw Valley Traction Co.* (Mich.), 37 R. R. R. 588, 60 Am. & Eng. R. Cas., N. S., 588.

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pellant to recover damages on account of personal injuries received by being thrown from a street car to the ground through the negligence of the agents of the company in charge of the car in suddenly starting it after it had stopped for the purpose of allowing her to and while she was in the act of alighting from it. The averments of the petition are that she boarded one of the appellant's cars for the purpose of riding to a point near the Louisville & Nashville railroad station in the city of Frankfort; and "that upon arriving at said station, and after said car was stopped at said point, plaintiff undertook and attempted to leave said car, and while in the act of getting off of said car, and when stepping from said car to the ground, the defendant, its servants and agents, negligently and carelessly caused and permitted said car to start or jerk suddenly and violently forward, and thereby she was thrown with great force and violence from said car to the street." The answer was a traverse and plea of contributory negligence.

The evidence on behalf of appellee sustained the charge of negligence contained in the petition; while the testimony for appellant showed that appellee attempted to alight from the car before it had stopped for the purpose of allowing her to get off, and that her injuries resulted from her own negligence, and not that of the persons in charge of the car.

With the pleadings and evidence in the condition stated, it is manifest that appellee was only entitled to recover in the event the jury believed from the evidence that, after the car had stopped for the purpose of allowing her to alight, it was suddenly started while she was in the act of getting off and before she had reasonable time and opportunity to do so. And it is equally clear that no other issue in her behalf should have been submitted to the jury. *Lexington Railway Co. v. Lowe*, 143 Ky. 339, 136 S. W. 618.

[1] But the court, after properly instructing the jury that: "If they believed from the evidence that, on the occasion in question, the plaintiff, while a passenger on defendant's car, undertook to alight from said car after same had stopped, if same was stopped, * * * and that the employees of defendant company in charge of said car knew, or by the exercise of ordinary care should have known, that the plaintiff was to leave said car, and if the jury further believe from the evidence that while plaintiff was in the act of alighting from said car, and before she had entirely alighted therefrom, and without notice to the plaintiff, and through the negligence of the defendant company's employees in charge of same, said car was caused to suddenly start forward, and the plaintiff was thereby thrown or caused to fall from said car to the ground, the jury will find for the plaintiff"—told them in instruction No. 2 that: "If they believed from the evidence that on the occasion in question the plaintiff attempted to alight from defendant's car while same

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was in motion and running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care for his own safety ought not to have so attempted, and that in so attempting to alight the plaintiff was caused to fall or be thrown to the ground and thereby injured, the jury will find for the defendant."

[2] Under the averments of the petition and the evidence for appellee in support of it, she was not entitled to recover at all, unless the car had stopped for the purpose of permitting her to alight, and while she was in the act of getting off, and before she had reasonable time and opportunity to do so, it was suddenly started. There was neither pleading nor evidence in her behalf to authorize an instruction that she might recover if she attempted to alight from the car before it had come to a stop. In cases like this the instructions should submit to the jury the issues made by the pleadings, and no other. So, that, under the pleadings and evidence, if, as appellee claimed, the car had stopped for the purpose of allowing appellee to alight, and while she was in the act of alighting, and before she had reasonable time and opportunity to do so, it was suddenly and violently started, and she was thrown to the ground and injured, she was entitled to recover. On the other hand, if she attempted to alight from the car before it had stopped, no matter at what rate of speed it was running, she was not entitled to recover.

[3] But, if it was prejudicial error to give instruction No. 2, appellant is not in a position to complain of it, as counsel for appellant requested the court to give an instruction in all respects similar to instruction No. 2. And it has often been held by this court that an appellant cannot complain of an instruction given on the trial if it is substantially the same as one asked by himself. *Toner v. South Covington & Cin. St. Ry. Co.*, 109 Ky. 41, 58 S. W. 439, 22 Ky. Law Rep. 564; *Union Central Life Insurance Co. v. Hughes*, 110 Ky. 26, 60 S. W. 850, 22 Ky. Law Rep. 1549; *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637, 24 Ky. Law Rep. 395.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* BRADLEY.

(Supreme Court of Arkansas, June 5, 1911.)

[138 S. W. Rep. 478.]

Carriers—Passengers—Injury Inflicted by Intoxicated Fellow Passenger—Negligence of Carrier—Evidence—Sufficiency.*—In an action for injury to a railway passenger, inflicted by an intoxicated fellow passenger, evidence held to support a finding that the trainmen were negligent in failing to protect the injured passenger.

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by Theyer Ula Bradley against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. H. West and *J. C. Hawthorne*, for appellant.

Basil Baker, for appellee.

MCCULLOCH, C. J. The plaintiff, Theyer Ula Bradley, is an infant of very tender years, and sues to recover damages for personal injuries inflicted by an intoxicated fellow passenger while she was riding on one of defendant's trains. She was a passenger with her parents on the train, and one Ellis, a fellow passenger, who sat immediately behind them in the coach, repeatedly placed his feet on the seats occupied by plaintiff and her parents. The evidence tended to show that he was intoxicated to a considerable extent, and disregarded the remonstrance of the other passengers as to his conduct. According to the testimony, after he had been required to remove his feet from the back of the chair a time or two, he threw them up again on the back of the chair, and one of them came down with great force and struck the plaintiff's head, inflicting personal injuries, which resulted in considerable suffering. The jury returned a verdict in favor of the plaintiff, fixing a small amount of damages, from which the defendant appealed.

The only contention, as ground for reversal, is that the evidence is insufficient to support a finding that the servants of the defendant in charge of the train were guilty of negligence in failing to give protection to the plaintiff. We are of the opinion, however, that there is evidence to sustain the verdict. It

*For the authorities in this series on the subject of the duty of a railroad company to protect its passengers against their fellow passengers, see first foot-note of *Penny v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535.

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tends to establish the fact that the conductor knew that Ellis was intoxicated and was giving annoyance to plaintiff's parents, and that he failed to take proper steps to protect them against the drunken passenger.

The judgment is therefore affirmed.

WADLEY SOUTHERN RY. CO. v. KENNEDY.

(Supreme Court of Georgia, June 17, 1911.)

[71 S. E. Rep. 740.]

Appeal and Error—Harmless Error—Statement by Court.—An immaterial and unprejudicial misstatement of a party's contention in the court's summary will not require a new trial.

Carriers—Trial—Instructions—Expression of Opinion—Duty of Carrier.*—The charge copied in the second division of the opinion was not open to the criticism that it contained an expression of opinion on the facts.

(a) The rule of law requiring railroad companies to exercise extraordinary diligence in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of cars thereon.

Sufficiency of Evidence.—The verdict is supported by the evidence, and is not excessive in amount.

(Syllabus by the Court.)

Error from Superior Court, Johnson County; B. T. Rawlings, Judge.

Action by J. E. Kennedy against the Wadley Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Gamble, for plaintiff in error.

Oliver & Oliver, for defendant in error.

EVANS, P. J. The Wadley Southern Railway Company con-

*For the authorities in this series on the subject of the degree of care required of a railroad as a carrier of passengers, see last paragraph of last foot-note of *Sherman v. Southern Pac. Co.* (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407; last foot-note of *St. Louis, etc., Ry. Co. v. Woods* (Ark.), 38 R. R. R. 404, 61 Am. & Eng. R. Cas., N. S., 404; third head-note of *Indiana Union Traction Co. v. Keiter* (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; third foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; last foot-note of *Washington, etc., Ry. Co. v. Trimyer* (Va.), 37 R. R. R. 114, 60 Am. & Eng. R. Cas., N. S., 114.

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structed a side track upon its main line to serve the interests of a patron of the road, who was operating a sawmill. The railroad company delivered empty cars and received the loaded cars on this siding, which was protected by a switch. The keys to the switch were carried by the employees of the railroad company. The employees of the sawmill firm forced out a staple in shifting the cars on the side track, for their convenience, and left the switch in an unclosed condition; and a passenger train ran into the switch and collided with the freight cars, and the shock of the collision threw the plaintiff, a passenger, against a forward seat, loosening her teeth and otherwise injuring the jaw. The same train had passed along at this point at 2 o'clock, and was on its return trip at about 7 o'clock, after dark, when it ran into the open switch. The switch was not protected by any light or other device to warn the engineer or others upon the train whether it was open or closed. The plaintiff recovered a verdict for \$1,500, which the court refused to set aside on motion.

[1] 1. It is complained that the court, in the summary of the railroad's contention, stated that the switch was left open by a party unknown. Error is assigned upon this statement of the contention, because the evidence showed that the switch was opened and left open by the employees of the lumber company, without authority of the defendant and without its knowledge. The erroneous statement by the court that the defendant contended that the switch was left open by an unknown person, when in fact the contention was that it was left open by an employee of the lumber company, could not have harmed the defendant. The carrier was insisting that it was not liable because of the act of an unauthorized person, and whether the name of that person was known or unknown was immaterial to the actual defense set up.

[2] 2. The court charged: "On the other hand, I charge you, if you find from all the facts and circumstances of the case that the defendant company constructed this side track used by certain parties for the purpose of loading cars along its line for the purpose of transportation over its railway, and such parties using said switch left said switch open negligently, and it was known to the defendant company, or could have been ascertained by them by the exercise of extraordinary care and diligence, and it was not ascertained, and they failed to exercise such care and diligence, and the wreck occurred in that way, then I charge you that that was negligence on the part of the defendant company." This instruction is alleged to be erroneous, because it was an expression of opinion that the enumerated facts and circumstances constituted negligence, and because it imposed upon the carrier the duty of exercising extraordinary care and diligence in the discovery of the open switch. It was but a concrete statement of the principle that the failure to ex-

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ercise due care constitutes negligence, and did not amount to an expression of opinion on the facts. With respect to the criticism that the charge imposed upon the carrier the duty of exercising extraordinary care and diligence in the discovery of the open switch, we do not think that the charge is erroneous for that reason. Extraordinary care is the measure of diligence required of a railroad company towards passengers, and this degree of care in the protection of passengers applies as well to the construction and maintenance of tracks as to the operation of cars thereon. *Macon, etc., Ry. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756.

[3] 3. The plaintiff in error asks that the verdict be set aside, because the recovery was excessive. The effect of the injury, as described by the plaintiff and her physician and dentists, was such that we are unable to say that the amount fixed by the jury was excessively large.

Judgment affirmed. All the Justices concur.

MCCABE *et al.* v. ATCHISON, T. & S. F. RY. CO. *et al.*

(Circuit Court of Appeals, Eighth Circuit, February 10, 1911.)

[186 Fed. Rep. 966.]

States—Formation—Enabling Acts—Construction.—The authority conferred by the act (Act June 16, 1906, c. 3335, 34 Stat. 267) enabling the people of Oklahoma and Indian Territory to form a constitution, which provides that the delegates to the constitutional convention shall adopt the federal Constitution, and shall form a state constitution which shall be republican in form, and which shall make no distinction in civil and political rights on account of race or color, and which shall not be repugnant to the federal Constitution, is a working rule, addressed to the delegates forming a constitutional convention, and, where a constitution formed by the convention has been declared by the President of the United States as authorized by the enabling act to conform to the enabling act, the obligations of the character indicated imposed by the enabling act cease, and individuals may not invoke the act as a prohibition against state legislation, though the enabling act also requires that the constitutional convention shall accept its terms and adopt an ordinance to that effect.

Constitutional Law—Equal Protection of the Laws.*—The provision of Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company doing business in the state to provide separate coaches for the accommodation of the white and negro races, equal in points of

*See foot-note of *Hart v. State* (Md.), 16 R. R. R. 622, 39 Am. & Eng. R. Cas., N. S., 622.

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comfort and convenience, and to maintain separate waiting rooms at their passenger depots for the accommodation of the races, does not abridge the privileges and immunities of the negro race, and deny to them the equal protection of the laws, in violation of the fourteenth amendment to the federal Constitution.

Constitutional Law—Equal Protection of the Laws.—The proviso in the statute that nothing contained therein shall be construed to prevent railway companies in the state from hauling sleeping cars, dining, or chair cars attached to their trains to be used exclusively by either white or negro passengers separately, imposes no obligation on carriers to haul such cars for either race, but permits them to haul such cars for the separate use of either of the races, and it is not discriminatory against either race, and does not deprive the negro race of the equal protection of the laws.

Constitutional Law—Equal Protection of the Laws.—Equality of service does not mean identity of service. It is only when conditions and circumstances are substantially alike, and when demand for luxuries like sleeping cars, dining cars, and chair cars is of a substantial character, that they must be furnished for one race, if furnished for the other.

Constitutional Law—Equal Protection of the Laws.—That carriers operating under Comp. Laws Okl. 1909, § 434 et seq., requiring carriers to provide separate coaches for the accommodation of the white and negro races, equal in all points of comfort and convenience, operate unevenly and oppressively to the negro race by their interpretation and execution of the statute, does not render the statute violative of the fourteenth amendment to the federal Constitution, as depriving the negro race of the equal protection of the laws.

Constitutional Law—Commerce Clause—Construction in Favor of Constitutionality.—Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company doing business in the state to provide separate coaches for the accommodation of the white and negro races, equal in all points of comfort and convenience, must be construed to apply to intrastate commerce alone, and, when so construed, it is not violative of the commerce clause of the federal Constitution.

Injunction—Incidental Relief—Bill—Sufficiency.—The allegations of a bill in a suit to enjoin railroads from obeying Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company to provide separate coaches for the accommodation of the white and negro races, brought before the statute became operative, that the railroads are making distinctions in the civil rights of the negro race and persons of the white race in the operation of its trains, in that equal comforts and accommodations will not be provided for the negro race, that passenger coaches maintained for the negro race are not provided with separate and equal toilet and waiting rooms for male and female passengers of the negro race, nor equal smoking accommodations, nor separate and equal chair cars, sleeping cars, and dining car accommodations, are too vague to constitute a cause of action,

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and, where the court denies the injunctive relief sought, it may not award damages as incidental legal relief.

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Suit by E. P. McCabe and others against the Atchison, Topeka & Santa Fé Railway Company and others. From a decree of dismissal rendered after sustaining a demurrer to the bill, complainants appeal. Affirmed.

E. O. Tyler, E. T. Barbour, and William Harrison, for appellants.

S. T. Bledsoe (J. R. Cottingham, C. O. Blake, Clifford L. Jackson, R. A. Kleinschmidt, and C. E. Warner, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This case turns upon the validity or true construction of an act of the Legislature of Oklahoma, approved December 18, 1907 (Comp. Laws Okl. 1909, p. 271, c. 9, art. 2, § 434 et seq.), requiring every railroad company doing business in that state as a common carrier of passengers to provide separate coaches or compartments for the accommodation of the white and negro races, equal in all points of comfort and convenience, and to maintain separate waiting rooms at all their passenger depots for the accommodation of those races also equal in all points of comfort and convenience.

The complainants, five negro citizens of Oklahoma, instituted this suit against the defendants, several railway companies doing business throughout Oklahoma in state and interstate commerce, to enjoin them from obeying this law, on the grounds (1) that it violates the provisions of the act enabling the people of Oklahoma and the Indian Territory to form a constitution and be admitted into the Union, approved June 16, 1906 (part 1, 34 Stat. 267), in this: that it makes a distinction between the civil rights of the negro and white race of men, contrary to the condition imposed by section 25 of that act; (2) that it is in conflict with the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens and deprives them of the equal protection of the laws; (3) that it violates the provisions of the commerce clause of the Constitution, in that it is an attempt to regulate commerce among the several states; and (4) that the several defendants are not in fact conforming to the requirements of the law by furnishing cars and waiting rooms for the negro race equal in point of comfort and convenience to those furnished for the white race. The learned trial judge sustained a demurrer to the bill, and, upon complainants declining to plead further, dismissed it. From this an appeal followed.

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[1] It is very clear, we think, that complainants cannot invoke the enabling act as in itself a prohibition against the legislation in question. The first paragraph of section 3 of that act reads as follows:

"That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory, * * * and, after organization, shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to form a constitution and state government for said proposed state. The Constitution shall be republican in form, and make no distinction in civil and political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The authority conferred by this section with its limitations and prohibitions was most obviously addressed to the delegates chosen under the provisions of section 2 of the act, when they should have assembled in convention for the purpose of forming a constitution and state government. A constitution which should make no distinction in civil or political rights on account of race or color was the only kind of a constitution the delegates were empowered to make. When it should be made and the provisions of the enabling act found to have been "complied with in the formation thereof" by the President, who was the arbiter constituted for that purpose by the fourth section of the act, the state became a member of the federal Union "on an equal footing with the original states." The working obligation or instructions imposed by the enabling act in the respect now under consideration upon the delegates chosen to make the Constitution ceased to have force or effect when that instrument was made and found and proclaimed by the constituted umpire to be in accordance with the act which authorized it. *Permoli v. First Municipality*, 3 How. 589, 609, 11 L. Ed. 739; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 2 Sup. Ct. 185, 27 L. Ed. 442; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *Bolln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; *United States ex rel. v. United States Express Co.* (D. C.) 180 Fed. 1006.

The requirement of section 22 of the enabling act that the constitutional convention should accept the terms and provisions of that act and adopt an ordinance to that effect, to which our attention is specially directed by counsel for complainants, affords no additional warrant for their contention. The provisions which called the convention into being and fixed boundaries and limitations upon its powers were not enlarged by the adoption of that ordinance; neither were they diverted from their

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object and purpose as plainly expressed. Whatever effect the acceptance of the terms and provisions of the enabling act may have upon other questions to which they might be applicable, we are clearly of opinion it was never intended by the language employed to transfer the limitation upon the powers of the convention itself to the state Legislature after statehood should have been accomplished.

Therefore, even if the Oklahoma statute in some of its provisions made a distinction in civil rights on account of race or color contrary to the instructions of the enabling act (which, however, is not admitted), no cause of action could be predicated upon that act itself, and no relief could be granted unless the distinction (or discrimination as it was called in argument) violated some of the prohibitions of the federal Constitution, which after statehood became the exclusive federal chart of complainants' civil and political rights.

[2] The argument is next made that the statute in question violates the fourteenth amendment to the Constitution of the United States, in that the enforced separation of the negro race from the white race in railroad cars and waiting rooms abridges the privileges and immunities of the former, and denies to it the equal protection of the laws. This question in our opinion is not an open one. The Supreme Court of the United States in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, has foreclosed further discussion. Mr. Justice Brown, speaking for that court, made these observations:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state Legislatures in the exercise of their police power. * * *

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana [similar to that here involved] is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public con-

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veyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state Legislatures."

In view of this decision further discussion of the general question is neither necessary nor seemly on our part.

[3] But there is one special feature of the Oklahoma statute which counsel for the complainants contend is in itself discriminatory and operates to deprive the negro race of the equal protection of the laws within the meaning of the Constitution. This is found in the proviso to section 7, which reads as follows:

"Provided that nothing herein contained shall be construed to prevent railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately, but not jointly." Laws 1907-08, c. 15.

In our opinion this contention is not sound. Other parts of the statute make ample provision for the actual transportation of both races in reasonable comfort and convenience. Separate coaches or compartments equal in all points of comfort and convenience must, under severe penalties, be carried on each trip by every train moving within the state. Sections 1 and 5. Sleeping cars, dining cars, and chair cars are, comparatively speaking, luxuries, and properly enough no such imperative provisions are made concerning them as are made concerning the common, and indispensable coach or compartment. The proviso imposes no obligation upon carriers to haul such cars for either race, but out of abundant caution lest the former provisions of the act, the keynote of which is equality of service between the races, should be construed to require the carriers to constantly haul separate sleeping, dining, and chair cars for them, it is provided that they might haul them for the separate but not joint use of either of the races. This provision in itself makes no more discrimination against one race than the other. The Legislature having in mind doubtless, what we judicially know, that the ability of the two races to indulge in luxuries, comforts, and conveniences was so dissimilar that sleeping and dining cars which would be well patronized by one race might be very little if at all by the other, legislated accordingly, and made a provision by which carriers might supply them for the exclusive use of either race as circumstances might dictate.

It may be conceded that the general principle of equality of service which pervades the Oklahoma statute and which is also required by the common and interstate commerce law (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) must be observed by all carriers. As a general rule, if carriers haul cars of special and peculiar convenience for citizens of one race, they must pro-

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vide equal service for citizens of the other race. Equality of service, however, does not necessarily mean identity of service; and manifestly this rule does not require permanent provision for equal service, irrespective of the demand for it. No mere question of abstract or theoretical right can require the constant and regular equipment and hauling of substantially empty dining, sleeping, or chair cars for either race. Practical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service to the two races in Oklahoma. Neither can any such interpretation be given to the statute of that state as would in effect require carriers to render service to either race without compensation. That would deprive them of their property without due process of law.

We conclude, in view of these and other like considerations, that the principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same.

[4] But it is contended that the carriers operate under this law unevenly and oppressively to the negro race and by their interpretation and execution of its provisions demonstrate that it is discriminatory. The contention is made on the supposed authority of the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and cases there cited. That was a case where the public authorities representing the state, against which alone the prohibition of the fourteenth amendment operates, exercised certain arbitrary powers conferred upon them by certain ordinances so as to unjustly discriminate the Chinese. The Supreme Court held that:

"Whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This doctrine in our opinion is totally inapplicable to the facts of the present case.

It may well be that the interpretation and application of a law of the state by the properly constituted authorities control

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its meaning within the purview of the Constitution; but most obviously such interpretation and application of it by private citizens, the defendant carriers in this case, can have no such effect. If it could, lawbreakers might, by their continued violation of a law, convert their own lawlessness into law, and the lawbreaker and not the lawmaker might become its final interpreter.

[5] Is this statute an invasion of the exclusive prerogative of Congress over interstate commerce?

It may be conceded that, if it applies to interstate transportation, it is a regulation of interstate commerce within the meaning of the Constitution. We think this follows from the doctrine laid down by the Supreme Court in *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. In that case a law of Louisiana as interpreted by its highest judicial tribunal required carriers of interstate commerce when operating within the limits of the state to receive colored passengers into cabins set apart for white persons. The court said:

"It [the statute] does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within."

This, it was held, interfered directly with the freedom of interstate commerce, and therefore encroached upon the exclusive power of Congress. See, also, *Louisville, etc., Ry. Co. v. Mississippi*, 133 U. S. 587, 590, 10 Sup. Ct. 348, 33 L. Ed. 784, and *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 391, 21 Sup. Ct. 101, 45 L. Ed. 244.

For like reasons, the Oklahoma law, if, as properly construed it embraces or relates to interstate commerce at all, would also be a regulation of that commerce. It compels carriers when operating in that state to exclude colored persons from cars or compartments set apart for white persons. The only difference between the Louisiana and the Oklahoma law is that the one compels carriers to receive into and the other to exclude colored persons from cars or compartments carrying white persons. They act alike directly upon the carrier's business as its passenger crosses the state line. Hence, if one is a regulation of interstate commerce, the other must be. The contention, therefore, that the provisions of the Oklahoma statute do not amount to a regulation of interstate commerce, if they concern that commerce at all, is untenable.

The question, then, is whether that statute when properly construed applies to interstate transportation or whether it is limited in its application to that transportation which has its origin and ending within the confines of the state. No provision is found in the act of indicating in any express terms that it was intended to apply to interstate commerce. All its provisions concerning the subject of legislation are general.

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Thus section 1 provides that "Every railway company * * * doing business in this state, * * * shall provide separate coaches," etc. Sections 2 and 6 make it unlawful "for any person" to occupy any waiting room or ride in any coach not designated for the race to which he belongs. While, therefore, the language of the act literally construed is comprehensive enough to include railroads doing interstate business and include passengers while making interstate trips, it neither in express terms nor by any implication other than that involved in the general language employed manifests any intention to invade the exclusive domain of congressional legislation on the subject of interstate commerce.

Local transportation or that which is wholly within the state only, being within the competency of the state Legislature, would naturally be presumed to have been alone contemplated in the law enacted by it. The constitutional inhibition against a state legislating concerning interstate commerce and the uniform decisions of courts of high and controlling authority emphasizing and enforcing that inhibition, without doubt, were actually as well as constructively known to the members of the Legislature of Oklahoma. It is unreasonable to suppose they intended to legislate upon a subject known by them to be beyond their power and upon which an attempt to legislate might imperil the validity of provisions well within their power. Any other view would imply insubordination and recklessness which cannot be imputed to a sovereign state. This conclusion is supported by abundant authority.

In the case of Louisville, etc., Ry. Co. v. Mississippi, supra, a statute of Mississippi similar to that under consideration requiring all railroads carrying passengers in that state to provide equal but separate accommodations for the white and colored races, and obliging the conductors of passenger trains to assign each passenger to his appropriate car, was under consideration. The case was a writ of error to the Supreme Court of Mississippi which had ruled (Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599) that the statute, although general and comprehensive in its language, was intended to affect only commerce within the state, and was therefore not in violation of the commerce clause of the Constitution.

The Supreme Court in its decision had regard to the interpretation of the statute by the Supreme Court of Mississippi, and held that commerce wholly within a state was not subject to the constitutional provision, and as a necessary consequence that the law was not an infraction of the commerce clause of the federal Constitution.

In Chesapeake & Ohio Ry. Co. v. Kentucky, supra, a statute was under consideration requiring all railroads to furnish sep-

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arate coaches or compartments of equal convenience and accommodation for its white and colored passengers, empowering conductors to assign each white or colored passenger to his appropriate car or compartment, and authorizing them to decline to carry any passenger who refused to occupy such car or compartment. The language of the statute was, literally speaking, sufficiently comprehensive to include interstate as well as intrastate transportation. In deciding the case the Supreme Court reviewed the *Mississippi Case* and *Plessy v. Ferguson*, supra, and also the case of *Ohio Val. Ry.'s Receiver v. Lander*, decided by the Court of Appeals of Kentucky, 47 S. W. 344, 20 Ky. Law Rep. 913. It quoted liberally from the last-mentioned case upon the authority of which the case then under consideration had been decided by the Kentucky court, to the effect that the Kentucky Legislature did not intend by the general language there employed to embrace transportation of interstate passengers, but only domestic or intrastate passengers. The Supreme Court then said:

"This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of all white and colored passengers, while they are in the state. * * *

But the court added:

"Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a Legislature the enactment of a law which it knew to be unconstitutional, and, if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the Legislature were competent to deal with. * * * While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and, if we were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it."

In the more recent case of *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, decided May 31, 1910, the Supreme Court again considered the contention of a colored person made under the Kentucky statute that he could not be required to occupy a car set apart exclusively for the transportation of persons of his race. It there reviewed its own decisions on the subject which have already been referred to, and refrained from discussing the constitutional restraint upon state Legislatures based upon the distinction between white and colored races, on the ground, as stated in the

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opinion, that it had been so much discussed in their own cases reviewed and cited "that we are relieved from further enlargement upon it." The judgment of the state court against the contentions of the colored person was affirmed; the court seeming to regard the great question now in controversy as foreclosed.

From the foregoing it appears to us that the decisions of the Supreme Court point to a harmonious and consistent attitude on its part adverse to complainants' present contention, and, while some of the decisions are fortified by local courts' interpretation of statutes, there seems to be a willing acquiescence in the interpretation so placed upon them.

Our own court likewise stands committed to a principle leading inevitably to the same result. In the case of *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 156 Fed. 1, we had before us the right of a foreign corporation doing business in Colorado to recover on certain contracts made by it with a domestic corporation. The defense was that the foreign corporation had not qualified to do business in Colorado and had not paid the annual license tax required by all foreign corporations by the Constitution and statutes of that state as a condition for doing business therein. This court, speaking by Sanborn, Circuit Judge, said:

"If the Constitution and statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the state, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations or suits for and against them in the national courts. There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is to-day, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adoption of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only * * * without a license from their state. Hence this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict with the Constitution and the laws of the United States. * * * An interpretation of this legislation so it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just, and it is supported by high authority."

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The Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, are thought to be authority against the conclusion reached by us in this case. In those cases it was held that the act of Congress approved June 11, 1906 (34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]), subjecting any common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the states to liability to "any of its employees," etc., was unconstitutional. Careful consideration of the opinions, however, has convinced us that the unconstitutionality of the act was not made to rest solely upon the provision creating a liability to "any" employee of a railroad company whether he was engaged in interstate commerce or not. As pointed out by Mr. Justice White, who wrote the opinion of the majority, the act of Congress had relation not only to railroads doing transportation business between the states, but to those engaged in that business within the District of Columbia and within any of the territories of the United States over which Congress had plenary legislative power. It might in the District of Columbia and territories regulate the relation of carrier to employee in both inter and intra state transportation. Hence came the dilemma. If the words "any employee," etc., were limited to such employee as was engaged in interstate commerce, as argued in support of the constitutionality of the act, it would destroy its applicability to all railroad employees engaged otherwise than in interstate commerce in the District of Columbia and territories. Mr. Justice White, speaking of this situation, said:

"Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested—that is, by causing the act to read 'any employee when engaged in interstate commerce'—we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

He then adds:

"Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that, where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed

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from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

Because, therefore, of the disposition of the Supreme Court uniformly shown in prior cases of like character to that now before us, we cannot believe the Employers' Liability Cases, involving as they did a totally different subject and one complicated by statutory provisions which would have been irreconcilable if the desired limitation had been imposed, were intended to be applicable to a case like this, or that on their authority we are required to overturn a well understood national policy concerning a troublesome interracial question.

The doctrine of this court as announced in *Denver & R. G. R. Co. v. Wagner*, 92 C. C. A. 527, 167 Fed. 75, 81, and that of the Supreme Court as stated in the *Employer's Liability Cases*, is that the legal provisions of the statute may be severed from those which are illegal, "where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated." Applying this rule to the present case, we have no doubt the Legislature of Oklahoma would have enacted the statute in question had it in terms related only to domestic transportation. Why? As already pointed out, it knew it could go no further. It knew that legislation regulating interstate commerce was beyond its power. Most obviously, then, it would not have imperiled the separation of the races in domestic transportation which, without doubt, comprehended the great bulk of that which materially concerned the convenience and sensibilities of the people of the state by deliberately invading the forbidden field of interstate commerce.

Our conclusion is that the act of Oklahoma is not violative of the commerce clause of the Constitution.

It is next contended that the demurrer to the bill was improperly sustained because its averments disclosed that the defendant railroad companies were not in fact furnishing for the negro race coaches or waiting rooms equal in point of comfort or convenience to those furnished for the white race; that complainants were thereby damaged and that they could secure relief of this kind as incidental to the injunctive relief prayed for. It is argued that equity has jurisdiction to avoid a multiplicity of suits and also because no adequate remedy could be had at law.

[6] The allegations of the bill thus brought into judgment are as follows:

That, notwithstanding the terms of said act of Congress and of the Constitution of the state of Oklahoma, the said above-named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of

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its trains and passenger service in the state of Oklahoma, in this, to wit: that equal comforts, conveniences, and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars, and dining car accommodations by providing for your orators and other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

These allegations are too vague and uncertain to constitute a cause of action either in equity or at law. Moreover, the suit was instituted before the Oklahoma statute went into effect. Of course, therefore, no cause of action for damages could be stated. But, even if that were possible, such incidental legal relief could not be awarded in this case after the main injunctive relief sought by the bill and which was alone prayed for had been denied. *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Lewis Publishing Co. v. Wyman* (C. C. A.) 182 Fed. 13, decided August 20, 1910, and cases cited.

Some questions of practice were argued at the bar and in the brief of counsel, but the disposition of the case on its merits dispenses with any consideration of them.

The decree below is affirmed.

DENVER CITY TRAMWAY CO. *v.* HILLS.

(Supreme Court of Colorado, April 3, 1911. Rehearing Denied June 5, 1911.)

[116 Pac. Rep. 125.]

Carriers—Transportation of Passengers—Street Railroads—Termination of Relation—Care Required.*—In the transportation of passengers on street cars, the relation of carrier and passenger does not terminate until the passenger has alighted and has both feet squarely on the ground; the carrier up to that time being bound to exercise the strictest vigilance not only in carrying him safely to destination, but also in setting him down.

Carriers—Injury to Passenger—Street Railroads—Time to Alight—Res Ipsa Loquitur.†—Plaintiff, a large portly man, arose from his seat at the back of a street car as it was approaching his destination, and, when it had come to or nearly to a standstill, attempted to alight. When standing upright, he could not observe the condition of his feet, and, as he stepped off the car, they became entangled in a rope which was lying on the floor of the car in front of the seat or on the seat, and which was either fastened to or part of the trolley rope. As he stepped from the car, it immediately increased its speed, and plaintiff's feet were jerked from under him by the rope, and he was dragged some distance, receiving serious injuries. He testified that he did not know of the existence of the rope nor of

*For the authorities in this series on the question whether a person may be a passenger after he has alighted from his train or street car at his destination, see first foot-note of *Columbus Ry. Co. v. Asbell* (Ga.), 38 R. R. R. 22, 61 Am. & Eng. R. Cas., N. S., 22; third foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; first head-note of *McDade v. Norfolk, etc., Ry. Co.* (W. Va.), 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; third head-note of *Louisville R. Co. v. Mitchell* (Ky.), 36 R. R. R. 710, 59 Am. & Eng. R. Cas., N. S., 710; last foot-note of *Layne v. Chesapeake & O. R. Co.* (W. Va.), 36 R. R. R. 537, 59 Am. & Eng. R. Cas., N. S., 537; last head-note of *Denver & R. G. R. Co. v. Derry* (Colo.), 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141.

For the authorities in this series on the subject of the degree of care required in discharging passengers, see foot-notes of *Rearden v. St. Louis, etc., Ry. Co.* (Mo.), 31 R. R. R. 429, 54 Am. & Eng. R. Cas., N. S., 429.

†For the authorities in this series on the subject of the presumption of negligence arising from the fact that a passenger is injured, see foot-note of *Minneapolis St. Ry. Co. v. Odegaard* (C. C. A.), 38 R. R. R. 427, 61 Am. & Eng. R. Cas., N. S., 427; first foot-note of *Nolan v. Newton St. Ry. Co.* (Mass.), 38 R. R. R. 378, 61 Am. & Eng. R. Cas., N. S., 378; foot-note of *Reems v. New Orleans, etc., R. Co.* (La.), 37 R. R. R. 570, 60 Am. & Eng. R. Cas., N. S., 570; second foot-note of *Knuckey v. Butte Elect. Ry. Co.* (Mont.), 37 R. R. R. 757, 60 Am. & Eng. R. Cas., N. S., 757; first foot-note of *Central of Ga. Ry. Co. v. Brown* (Ala.), 37 R. R. R. 197, 60 Am. & Eng. R. Cas., N. S., 197; second foot-note of *Brice v. Southern Ry. Co.* (S.

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the danger until after the accident. Held, that such facts raised a presumption of negligence on the part of the carrier under the doctrine *res ipsa loquitur*.

Carriers—Injury to Passenger—Street Railroads—Care Required—Trolley Rope.†—Where a street car passenger was injured in attempting to alight by his feet becoming entangled in the end of a trolley rope, it was the carrier's duty not only to provide a suitable rope and place for fastening it, etc., but also to see that the rope was fastened when the car started on its journey, and to exercise the highest diligence consistent with the operation of the car to see that it continued to remain fastened and in a safe place during the entire trip.

Carriers—Injuries to Passengers—Alighting from Street Car—Danger—Res Ipsa Loquitur.†—Where a street car passenger was injured in alighting from a street car by his feet becoming entangled in the end of a trolley rope negligently left lying on the floor of the car without the passenger's knowledge, the doctrine of *res ipsa loquitur* was not rendered inapplicable because the passenger was not passive or under the absolute control of the carrier, but was attempting to alight; the doctrine of *res ipsa loquitur* being applicable where the passenger is making a voluntary movement, and the injury is caused by something absolutely either in the position or condition of the carrier's appliances, or in the management of the means of transportation.

Evidence—Hearsay—Reports of Accidents.—Where it was not claimed that defendant's claim agent had ever seen an accident, his information being derived entirely from reports made to him by other people not under oath, evidence in an action for injuries to a passenger by his feet becoming entangled in the end of a trolley rope as he was endeavoring to alight, that he had been claim agent for defendant for a long period of time prior to the trial, that all reports of accidents had been made to him, that he investigated them, and that in all his experience as claim agent he had never received any report, nor had any claim ever been filed on account of injuries sustained by a person becoming entangled in trolley ropes until the accident in question, was inadmissible as hearsay.

Carriers—Injury to Passenger—Negligence—Evidence.—Even if such testimony had not been hearsay, it was incompetent; the fact that no such accident had ever occurred before having no tendency to show absence of negligence in permitting a situation where an accident did happen.

C.), 37 R. R. R. 178, 60 Am. & Eng. R. Cas., N. S., 178; O'Callaghan v. Dellwood Park Co. (Ill.), 37 R. R. R. 182, 60 Am. & Eng. R. Cas., N. S., 182; first head-note of Eaton v. New York Cent., etc., R. Co. (N. Y.), 37 R. R. R. 252, 60 Am. & Eng. R. Cas., N. S., 252.

†See foot-note of Sherman v. Southern Pac. Co. (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407.

†See foot-note on preceding page.

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Trial—Reception of Evidence—Rebuttal.—Where, in an action for injuries to a street car passenger by his feet becoming entangled in the end of a trolley rope as he was endeavoring to alight, defendant offered evidence of the usual, general, and customary way of fastening such ropes not limited to any particular time, plaintiff was entitled to prove in rebuttal the manner and place in which the ropes were fastened on the line on which he was injured at the time of the trial.

Damages—Personal Injuries—Medical Expenses—Instructions.—Where, in an action for injuries, the court charged that the jury must make all the findings from the evidence, and the evidence as to damages for medical and surgical expenses showed only \$25, and that they were necessary and reasonable in amount, and the instructions as to other matters were limited to such elements of damages as the evidence showed were actually sustained, an instruction that in determining the damages the jury should consider plaintiff's expenses, if the evidence showed he had incurred any, for medical services, the pain and suffering to which he had been subjected, both mental and physical, the loss of time resulting from the injury, the nature and extent of his physical injuries, and their effect, if any, upon his ability to earn his living since the accident, as compared with his ability to do so before, and the probable effect if any of such injuries on future capacity for work and ability to earn his living, was not error for failing to require that the medical expenses must be reasonable and necessary.

Trial—Instructions—Necessity of Requests.—Where defendant offered no request to charge concerning the measure of damages, it could not complain because the court did not charge in greater detail as to the different elements of damage.

Trial—Instructions—Applicability to Evidence.—Instructions should be limited to the law applicable to the facts of the particular case.

Trial—Instructions—Refusal of Request.—It is not error to refuse a request to charge substantially covered by instructions given.

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Henry A. Hills against the Denver City Tramway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles J. Hughes, Jr., Gerald Hughes, and Howard S. Robertson, for appellant.

James H. Pershing and William E. Hutton, for appellee.

HILL, J. Appellee brought this action against appellant to recover for personal injuries which he received while in the act of alighting from one of its cars. The jury found for appellee and fixed his damages at \$3,500, from which this appeal is prosecuted.

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The evidence shows that the appellee entered one of the appellant's street cars at the corner of Glenarm and Seventeenth streets, in the city of Denver, taking his seat in the rear, or next to the rear seat, at the back end of the car, intending to ride down Seventeenth to Market street, near where his place of business was situate. When approaching the last-named street, the appellee gave the necessary signal for the car to stop, the conductor responded, and the car proceeded to slow down and had come to, or nearly to, a standstill at the time the appellee attempted to alight. The evidence is conflicting as to whether the car had stopped or was still very slightly in motion. The car was inclosed in the center and open at each end. The rear seats, where the appellee was sitting, extended, the full width of the car, and there were long steps upon each side of the car where these seats were for ingress and egress to these seats and the other parts of the car. At the time the appellee was stepping down to get off of the car, a rope, partially coiled, was lying upon the floor of the car in front of his seat, or on the steps where the appellee stepped down in getting off the car. The result was that in alighting in some manner this rope (which was quite light) became entangled around one of appellee's feet as he stepped from the car. The car immediately started or increased its speed. The appellee's feet were jerked from under him by this rope, and he was dragged some distance, by which accident he received the serious injuries complained of. It developed further that this rope was fastened to, or was a part of, the trolley rope used in holding the trolley upon the wire overhead. It was not in the place where it belonged, and the conductor, even in the exercise of ordinary care, could have ascertained that fact. No explanation was furnished upon behalf of the company or otherwise as to how it got in the place or position where it was at the time of the accident. It is not disclosed whether it was through a defect of the appliances used in connection with the operation of this trolley rope, or in the negligence of the employees of the company, that it became unfastened after it was last changed, if it had then been so fastened or otherwise, in order to reach this unusual position where it never belonged, and where it became a menace to the safety of passengers.

A large number of the assignments of error pertain to a motion of the appellant for a directed verdict in its favor, the admission and rejection of certain evidence, the giving and refusal to give certain instructions, all of which are along the same line, and are covered by the same principles of the law, and will be considered together. It is claimed that the doctrine of *res ipsa loquitur* is not applicable to the facts for the following reasons: (a) That the relation of carrier and passenger did not exist when the accident occurred; (b) that the accident was not due to any defect in the roadbed, machinery, appliances, or equip-

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ment of the appellant, nor to any failure upon its part to provide a proper place for the disposal of this trolley rope; (c) that the appellee at the time of the accident was not passive and under the control of the appellant, but was engaged in attempting to get off this car, and that his own voluntary act might just as reasonably have contributed to the injuries. Referring to this last, counsel say: "It is just as probable that this accident should happen without any neglect upon the part of the appellant as it is that it was due solely to negligence upon its part; in other words, intervening agencies might just as reasonably have been responsible for its occurrence." Had the injury occurred through the intervention of anything else upon the street after the appellee had alighted, not connected with the car which he was then attempting to leave, and over which the employees of the appellant in charge of this car had no control, the contention of counsel might be applicable but that is not the fact here.

[1] In the case of *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, this court, at page 371, 33 Pac. 108, at page 109 (20 L. R. A. 729), quotes with approval from *Pennsylvania Railroad Co. v. White*, 88 Pa. 333, the following: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely if human care and foresight can do so." As well said by the Court of Appeals of Missouri in the case of *Senf v. St. Louis & Suburban Railway Company*, 112 Mo. App. at page 85, 86 S. W. at page 891; "The relation of carrier and passenger does not end until the passenger is off the car and on the street in safety. *O'Brien v. St. Louis Transit Co.* [185 Mo. 263], 84 S. W. 939 [105 Am. St. Rep. 592]; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573, 77 S. W. 314; *Lehner v. Railway* [110 Mo. App. 215], 85 S. W. 110; *Richmond Street Railroad Co. v. Scott*, 86 Va. 902 [11 S. E. 404]. To the same effect is the case of *Spangler v. Saginaw Valley Traction Company*, 152 Mich. at page 411, 116 N. W. at page 375, where that court said: "It would be a narrow application of the rule to hold that the carrier's duty was in all cases performed if a passenger reached and stood upon the surface of the street in safety. If a passenger alighted in the night, in a dark place, at a point where a step made in any direction would be into an excavation made by the carrier in a street, the surface of which had been theretofore smooth and comparatively level, the existence of the excavation being unknown to the passenger, it would be doing violence to terms to say that the car was stopped and the passenger invited to alight at a proper place, or that the passenger had safely alighted." We cannot agree to the correctness of the argument of counsel wherein they contend that this passenger was set down safely because he got both feet squarely upon the ground, when,

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as a matter of fact, a rope fastened to the car with a noose in one end of it was the platform or steps, and in his alighting, without negligence on his part, it got fastened about his leg and was still connected with it when he stepped upon the street. Our views from the facts disclosed are that the appellee had not ceased to be a passenger of the appellant, and that such relation did not cease so long as, under the circumstances here shown, he had, through the negligence of the appellant, anything attached to him connected with this car, which, when it started, would tend to take him with it.

[2] The appellee was a large portly man. When standing upright he could not observe the condition of his feet, nor the danger to them from the rope. There is no evidence to show that he failed to exercise reasonable diligence as to any danger which he might reasonably expect. His testimony is positive to the fact that he did not know of the existence of the rope nor of the danger until after the accident had occurred. Under these circumstances, only one conclusion could have been reached, that the company had not yet complied with its duty in respect to his leaving the car, or given him an opportunity to safely alight therefrom. In the case of *Kansas Pacific Railway Co. v. Miller*, 2 Colo. at page 457, this court said: "The presumption of negligence, however, does not attach itself to every injury which may overtake a passenger while being transported in a car. It belongs only to that class of accidents where the injury is caused by a defect in the roads, cars, or machinery, or by want of diligence or care in those employed, or by some other thing which the company can and ought to control." Applying this principle to the case under consideration, a trolley rope is something which a tramway company can and ought to control. *Wall et al. v. Livezey*, 6 Colo. 465; *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; *Western Md. R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618; *Montgomery Street Ry. Co. v. Mason*, 133 Ala. 508, 32 South. 261. We conclude that the doctrine of *res ipsa loquitur* is applicable to the facts here. *Melton v. Birmingham Ry., L. & P. Co.*, 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467; *Hutchinson on Carriers* (2d Ed.) § 651; *Denver Con. Tramway Co. v. Rush*, 19 Colo. App. 70, 73 Pac. 664; *McDonnell v. Chicago City Ry. Co.*, 131 Ill. App. 227; *D. & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954. We cannot agree with the appellant that the evidence introduced by it was sufficient to overcome any presumption raised in the appellee's favor, when he showed the conditions under which the accident occurred and the result. In this respect counsel contend that the evidence disclosed the fact that this car was being run from the Union Depot up Seventeenth street to somewhere above the Brown Palace Hotel near Broadway, where it switched to the opposite track on the same street and made the return trip to

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the depot, at each of which points the trolley rope and pole were reversed, which necessitated the loosening of the rope from the car and its again being fastened at the other end; that the conductor testified to the fact that he so made this change at Broadway upon this return trip, at which time he fastened the rope in the usual manner and place, and that this evidence is undisputed and was not overcome, and that it was sufficient to overcome any presumption that was raised in the appellees favor. Upon cross-examination the conductor admitted he did not remember what actually took place at the last time the rope should have been changed before the accident.

[3] But, regardless of this, it is sufficient to say that it was not only the duty of the appellant to provide a suitable trolley rope and pole, the place for fastening, etc., but it was also its duty, through the conductor, not only to see that the rope was fastened at the time the car left Broadway, but to exercise the highest degree of diligence consistent with the operation of the car in seeing that it continued to remain fastened, and so remain in a safe place during the entire trip. This was a question for the jury to determine. That he did not do so is conclusive to the mind of any person of ordinary knowledge, as the circumstances were such, and the proper position for this rope was such that had he exercised any diligence in this respect the accident would not have occurred.

[4] Counsel urge that the doctrine of *res ipsa loquitur* does not apply, for the reason that the appellee at the time of the accident was not passive nor under the absolute control of the appellant, but was engaged in attempting to get off of the car, which reason they contend that his own voluntary movements may have assisted in bringing about the accident. It is probable that, had he sat still and never gotten off of the car, the accident would not have occurred; but there is no evidence that anything other than the presence of the trolley rope caused the accident. Appellee stepped off the car at the usual place, in the usual manner, and gained foothold on the street. If it had not been for the position of the trolley rope, no accident or injury would have occurred by reason of his alighting from the car. It is not a dangerous act to alight from a street car. In this case it only became dangerous by virtue of the negligence of the appellant in allowing a rope to be in a dangerous position where it might catch, trip, and throw a passenger. Of course, if he was guilty of contributory negligence, he could not recover, but this question was submitted to the jury under proper instructions. The authorities pertaining to this question on which appellant relies are all based upon a state of facts where the injury was actually caused by the acts of the passenger, rather than by some condition of the appliances under the control of the carrier. In the case of *Paul v. Salt Lake City Ry. Co.*, 30 Utah, 41, at page 49, 83 Pac.

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563, at page 565, the plaintiff was injured while alighting from a street car, due to the sudden starting of the car, the court said: "In case of a carrier and passenger the rule of *res ipsa loquitur* applies not only to cases of collision, derailing, and upsetting of coaches, breaking of machinery, appliances, and the like, but also to the doing of acts by the servants operating the machinery, and to the management of instrumentalities over which the carrier has control, and for the management of which he is responsible." That the doctrine of *res ipsa loquitur* is applicable where the passenger is making a voluntary movement, and the injury is caused by something absolutely either in the position or condition of the carrier's appliances, or in the management of the means of transportation, is clearly shown by the following cases: *Gilmore v. Brooklyn Heights R. Co.*, 6 App. Div. 117, 39 N. Y. Supp. 417; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748; *Burt v. Douglas County Street Ry. Co.*, 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479; *Paul v. Salt Lake City Ry. Co.*, 30 Utah, 41, 83 Pac. 563; *Rosen v. Boston*, 187 Mass. 245, 72 N. E. 992, 68 L. R. A. 153; *C. & A. R. Co. v. Buckmaster*, 74 Ill. App. 575; *Chicago City Ry. Co. v. Carroll*, 102 Ill. App. 202; *Butler v. City of Kingston (D. C.)* 77 Fed. 655; *Rattan v. Central Elec. Ry. Co.*, 120 Mo. App. 270, 96 S. W. 735; *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032; *McCord v. Railroad Co.*, 134 N. C. 53, 45 S. E. 1031; *Barnes v. N. Y. Cent. & H. R. R. Co.*, 42 Misc. Rep. 622, 87 N. Y. Supp. 608. This disposition of these questions carries with it all assignments of error pertaining to instructions given and refused along the same lines, likewise any evidence complained of, in connection with this phase of the case.

[5] Complainant is made to the ruling of the court in refusing to permit Samuel C. Dorsey, the claim agent of the appellant to testify, that all reports of accidents of the company, for a long period of time previous to the trial, had been made to him; that he investigated them; that during all of his experience as such claim agent he had never received any report nor had any claim ever been filed on account of injuries sustained by reason of parties becoming entangled in trolley ropes and that during all of such time he had never heard of, nor had there ever been reported, the occurrence of any such an accident save the one in this particular case.

[6] Appellant did not offer to show that the witness had ever seen an accident, but from the above statement it will be seen that his information was gained from reports made to him by other people not under oath, the substance of which testimony, if admitted, would have been as to what these reports contained, what he had heard, and what he had not heard as to how accidents happened. This was purely hearsay, and was not com-

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petent; and, even if the witness Dorsey had been personally present at many accidents concerning which he attempted to testify, still his testimony as to how other accidents occurred would be immaterial to any issue in this case. The cases cited to sustain this position relate to structural or permanent conditions where an appliance is in a permanent fixed position and condition on all cars of a carrier. The fact that a million passengers have used such cars without accident, as in the New York cases, might be some evidence that such appliance in its usual position is not dangerous. In some of these cases it is expressly stated that, if the accident was caused by the manner of operating the road, the evidence offered would be deemed incompetent. None of them are applicable to the facts here. This may have been the only time in many years that the appellant through its agents was negligent with respect to its trolley ropes, but proof that it exercised proper care on other occasions, and that no accident occurred at any other time, would not be competent to absolve it from responsibility from the want of care on this particular occasion.

[7] Complaint is also made to the evidence of one witness offered in rebuttal as to the manner and place in which trolley ropes were fastened on the Seventeenth Street car line at the time of the trial, for the reason that it is claimed that all evidence of this character should be confined to the custom that prevailed at the time of the accident. Counsel claim that this witness was allowed to testify, not to any facts that existed when the accident occurred, but to a state of facts that he himself observed some three or four years after the injuries in question had been received, and as they allege, after the type and construction of the car and the manner of fastening the trolley rope had been changed on account of the changed conditions. We think this evidence was competent in rebuttal to the evidence offered by appellant. It offered testimony as to what was the usual, general, and customary manner of fastening these ropes. It was given considerable latitude in this respect. Some of this evidence does not appear to have been limited to any particular time. Its witness Casey testified, in substance, that the design and construction of the fenders used on all the cars of the defendant company are of the same general character and make, and were in August, 1903. The strap of iron is a permanent portion of the fender and necessary in its construction. The trolley ropes are of customary and uniform length—which is 25 feet—and that is the length that was used in 1903. The size of a trolley rope was the same in 1903 that it is now. From the foregoing and other testimony, we take it that the appellant was permitted to introduce evidence of the manner of fastening trolley ropes in general at other times than on the specific occasion of the accident. It all tended to

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show that there was a general, usual, and customary place and manner of fastening the trolley ropes from the time of the first employment by the company of some of these witnesses down to the time of giving their testimony, which included the period from the time of the accident to the trial. Under these circumstances, where the appellant was allowed to introduce evidence, if immaterial, it cannot complain if the appellee was allowed, likewise, to introduce evidence in rebuttal to it. When this testimony was admitted it was stated that it was offered for the purpose of impeachment, and it would only tend to impeach the testimony which it contradicted. Under these circumstances, we find no prejudicial error in the admission of this testimony. Wigmore on Evidence, § 15.

[8] Complaint is made to the instruction given concerning the measure of damages. It is claimed that it is too broad and general in its terms, and does not lay down any rule of law to assist the jury in arriving at a correct and proper estimate of the loss sustained. The specific objections are that it permits a recovery for any expense that the appellee may have been put to regardless of whether they were necessary or reasonable, pertaining to which counsel claim it is a fundamental principle that it is only necessary to show the amount expended, but to go a step further, and to show that such amount was necessary and reasonable. This instruction reads as follows: "The court instructs the jury that, if you find the issues herein for the plaintiff, in determining the amount of damages to which he is entitled by reason of his injury, you have a right to consider his expenses, if you find from the evidence that he incurred any expenses for medical and surgical assistance, the pain and suffering to which he has been subjected, both mental and physical, and the loss of time which has resulted from his injury, the nature and extent of his physical injuries, and their effect, if any, upon his ability to earn his living since the accident, as compared with his ability to do so before, and the probable effect, if any, of those injuries upon the future capacity for work and ability to earn his living, but in no event shall the damages exceed the sum of \$15,135."

[9] The appellant did not suffer any instruction concerning damages, and is not in a position to complain because the court did not set forth more details with reference to the sundry elements of damages. Its complaint to the one given for the medical and surgical services is not well taken. The evidence disclosed that the appellant without expense to the appellee had furnished him with a very able and competent physician and surgeon who attended him for a considerable period of time; that the total claim for medical expenses was limited to \$20 or \$25 for attendance by the appellee's family physician for a few trips only and some others in consultation with the surgeon

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of the appellant company. We think the evidence as a whole shows that this amount was reasonable and these services necessary, and that it did not require the opinion of an expert on those questions, and that the jury could not have been misled concerning it. A somewhat similar instruction was approved in the case of *Denver City Tramway Company v. Martin*, 44 Colo. 324, 98 Pac. 836, wherein this court quoted with approval from *Hannibal & St. Joseph R. R. Co. v. Martin*, 11 Ill. 219. Besides, the instructions as a whole, in substance, told the jury that they must make all their findings from the evidence. The evidence upon the question of damages for medical and surgical expenses was limited to those necessary and in a reasonable amount and upon the other matters the instructions limited to it such elements of damages as the evidence showed were actually sustained by the appellee. From the extent of the injuries disclosed we are of the opinion that the amount awarded was not excessive.

Fifty-seven assignments of error have been presented. All appear to have been covered by elaborate briefs. We have carefully examined all of them, and have thoroughly considered the arguments and citations of authorities to support them. To discuss in detail each of them would necessarily render this opinion too long. Our conclusion is that there was no prejudicial error committed at the trial.

[10] Instructions should always be limited to the law applicable to the facts of the particular case.

[11] Those refused that were applicable were substantially covered by the instructions given. Other instructions tendered were not applicable to the facts under consideration and should not have been given, although some of them may be correct enunciations of the law when applicable. Others tendered, which were refused, should not have been given. The jury were correctly instructed as to the law applicable to the facts disclosed by the evidence.

There being no prejudicial error, the judgment will be affirmed. Affirmed.

CAMPBELL, C. J., and GABBERT, J. concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. MCCURDY.

(Supreme Court of Alabama, May 18, 1911.)

[55 So. Rep. 616.]

Carriers—Injuries to Passengers—Liability—Evidence.*—Where a passenger suffers injury, the law, in the absence of explanation by the carrier, presumes that it was the result of the carrier's fault, and it has the burden of overcoming the presumption.

Carriers—Injuries to Passengers—Complaint—Sufficiency.—A complaint in an action for injuries to a passenger which avers the negligence of the carrier in such general language as to amount to hardly more than a statement of a mere conclusion is good as against a demurrer.

Carriers—Injuries to Passengers—Complaint—Sufficiency.—A complaint in an action for injuries to a street car passenger while alighting, which alleges that the injuries resulted as the proximate consequence of the negligence of the carrier or its servants in charge of the operation of the car, sufficiently charges the liability of the carrier as against a general demurrer.

Carriers—Injuries to Passengers—Existence of Relation—Issues—Matters to Be Proved.—One suing a carrier for injuries received while a passenger must establish the fact that he was a passenger at the time, though during the trial there is no suggestion of a denial of that fact.

Carriers—Injuries to Passengers—Existence of Relation—Evidence—Sufficiency.—In an action against a carrier for injuries to a street car passenger, evidence held to justify a finding that plaintiff was a passenger at the time, in view of the fact that there is no presumption that she was wrongfully on the car.

Trial—Instructions—Assumption of Facts.—Where, in an action for injuries to a street car passenger while alighting, the undisputed evidence showed that the car was stopped to allow passengers to alight or board the car, the court in its charge could assume that fact.

Trial—Injuries to Passengers—Instructions—Assumption of Facts.—An instruction in an action for injuries to a street car passenger while alighting that, if the car moved at the direction of the car men while plaintiff was alighting, there was negligence if they knew she was in the act of alighting, and that it was their duty to know whether she was in the act of alighting, and whether a passenger was alighting when the car moved, etc., did not assume that plaintiff was a passenger, but left it to the jury to say whether plaintiff was entitled to the protection of a passenger, and was sufficient, in the absence of any requested charge on the subject.

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that passenger was injured, see second foot-note of preceding case.

Birmingham Ry., Light & Power Co. v. McCurdy

Appeal from City Court of Birmingham; Robert N. Bell, Special Judge.

Action by Elizabeth McCurdy against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Tillman, Bradley & Morrow and *L. C. Leadbeater*, for appellant.

McArthur & Howard, for appellee.

SAYRE, J. Demurrer to the first count of the complaint was overruled. This count, after alleging that plaintiff was injured while a passenger on a car operated by the defendant as a carrier of passengers for hire, and describing her injuries with particularity, proceeds: "And plaintiff avers that her said injuries resulted as the proximate consequence of the negligence of defendant, or its servants or agents in charge of the operation of the said car upon which plaintiff was a passenger, as aforesaid." The objections to this count are stated to be that in its second alternative, which attributes plaintiff's injury to the negligence of defendant's agents, it fails to show that defendant's agents were guilty of negligence in the operation of the car, and that it fails to show that defendant's agents were guilty of any negligence in the carriage of plaintiff as a passenger. The count is further said to be vague, indefinite, and uncertain. Where the suit is by an employee against his employer, as was the case in *Sloss-Sheffield Co. v. Smith*, 166 Ala. 437, 52 South. 38, cited by appellant, some degree of particularity in averment is required. In such cases no presumption of negligence arises out of the fact of injury. [1] But, where a passenger suffers injury at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption. *L. & N. R. R. Co. v. Jones*, 83 Ala. 376, 3 South. 902. [2] For this, and for the further reason that what the defendant did, and how he did it, and what he failed to do, are generally better known to the defendant than to the plaintiff, however insufficient these reasons may seem to a corporation conducting its business through the agency of many persons, where the suit is by a passenger, as here, great generality in the averment of negligence, amounting to hardly more than the statement of a mere conclusion, has been too long tolerated to be now made the subject of further discussion. Aside from some verbal niceties which are indulged, the argument for the demurrer in effect reiterates the common objection to generality of averments. [3] If we may reasonably assume for the moment the count to be capable of the construction that defendant's servants engaged at the time in the actual manipulation of the machinery of and

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on the car may have been at the same time performing some other service, not so immediately connected with the movement of the car, and performing that service negligently, or that defendant's service in some other branch of the service may have been guilty of the negligence charged, still the plain averment is that plaintiff was a passenger, and that there was negligence on the part of defendant's servants, which resulted in her injury. These averments are enough to show the liability of the defendant and to make the count proof against the demurrer. *Armstrong v. Montgomery Street Railway Co.*, 123 Ala. 233, 26 South. 349; *Birmingham Railway Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27; *L. & N. R. R. Co. v. Church*, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29; *Birmingham Railway Co. v. Haggard*, 155 Ala. 343, 46 South. 519.

We find nothing to the contrary of what we have said in *Gordon v. Tenn. Coal & Iron Co.*, 164 Ala. 203, 51 South. 316. In that case the plaintiff, who had no particular relation with the defendant, alleged that, while he was traveling along a highway across defendant's track, a car upon defendant's track ran upon or against him. The original complaint failed to show that defendant or its agents had anything to do with the movement of the car. If the plaintiff relied upon some negligence other than in the movement of the car, as may possibly have been the case under the complaint as originally drawn, that fact should have been averred, so as to avoid the injustice which would result if the complaint had been sustained against demurrer on a mere intimation that defendant was operating the car, and later the issues of fact allowed to be determined without reference to the truth of the intimation. The case is not clearly reported, but the fact is that the issues involved were submitted to the jury after the complaint had been amended so as to charge that the defendant was operating the car, thus making clear the alleged right upon which the plaintiff relied.

It is contended that the plaintiff utterly failed to make good her allegation that she was a passenger. Plaintiff failed to testify in terms that she was a passenger, or that she had paid her fare, or that it had been paid for her. [4] This was due, no doubt, to inadvertence induced perhaps by the fact that nowhere in the progress of the trial does there appear to have been any suggestion of a denial of the fact. It was nevertheless incumbent on her to prove the fact, and it could not be assumed in the trial court, nor will it be assumed here. [5] We think there was evidence from which the jury was authorized to infer that plaintiff was a passenger. That she, with two companions, had traveled upon defendant's car from East Lake to the corner of Second avenue and Twentieth street, in the city of Birmingham, was clearly shown, and not denied. At that point the car was stopped "for passengers to get off," as one witness put it, and the gate upon the platform opened. Persons got on and off

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the car. Plaintiff's case was that she was delayed somewhat by her companions, who were in front of her, and by other persons coming upon the car, and that, just as she was in the act of alighting, the car moved forward, throwing her to the ground. The entire evidence is set out in the record, and it shows the case to have been fought out on the question whether the car had moved as plaintiff was in the act of alighting from the car. There is no presumption that plaintiff was wrongfully on the car, though she carried the burden of showing that she was there as a passenger. There is no intimation that she was there in any other capacity. Under the evidence stated it was permissible for the jury to infer that she was there as a passenger. The general charge, requested by the defendant, was properly refused.

In his general charge to the jury the court said: "If, on the other hand, you believe that the car moved by direction of those in charge of the car while she was alighting, then that would be negligence, if they knew she was in the act of alighting, and it is their duty to know whether or not she is in the act of alighting, whether or not a passenger is when the car moves; so that you reach the important question whether or not the car was moved at the time she alighted from the car." Complaint is made of this charge as erroneous, in that it asserted as matter of law that it was the duty of those operating the car to know whether plaintiff was in the act of alighting from the car before moving it, whereas that duty depended upon circumstances as to which the evidence was in conflict. In this connection it is again said that it did not appear that plaintiff was a passenger and, further, it is urged that it was not shown that the car had stopped for the purpose of letting off passengers, that there was no implied invitation to alight at that point. Enough of the evidence has already been stated to show that this contention is without merit. [6] So far as concerns the place of stopping, the undisputed evidence admitted of but one rational construction: That the car was stopped at that point for the purpose of allowing passengers to get on and off the car. The court may have assumed the fact without error therefore. *Carter v. Chambers*, 79 Ala. 223; *Wyche v. Montgomery*, 53 South. 786. [7] As for the alleged assumption that plaintiff was a passenger, if it be conceded that plaintiff's case depended upon an inference not quite so clear, the court appears in its last expression to have stated the proposition in a way to avoid or correct the fault imputed to an earlier phrase of the charge. The meaning of the court's last expression was that at the place and under the circumstances shown it was the duty of defendant's agents to know whether a passenger, any passenger, was about to alight. This was a correct statement of the general law on the undisputed facts, and left it to the jury to say whether the plaintiff was entitled as a passenger to invoke the doctrine. No doubt, if the court's attention had been directed to the particular phrase

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in question, the matter would have been made even clearer. We find no error in the charge.

The motion for a new trial, among other things to which we have already adverted, went upon the grounds that the verdict was contrary to the great weight of the evidence, and the damages awarded were excessive. The entire evidence has had careful consideration with the result that we are unable to say that there was error. *Central of Georgia Railway Co. v. Brown*, 165 Ala. 493, 51 South. 565.

Affirmed.

DOWDELL, C. J., and ANDERSON and SOMERVILLE, JJ., concur.

WHITE v. ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi, June 19, 1911.)

[55 So. Rep. 593.]

Carriers—Passengers—Freight Trains—“Train for Both Passengers and Freight.”—A regular local freight train, to which is attached a way car, with compartments for passengers, baggage, trainmen, tools, etc., is not a “train for both passengers and freight,” within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on freight trains not so intended.

Carriers—Passengers—Carrier’s Common-Law Duty.*—At common law a carrier owes passengers the utmost degree of care for their safety, regardless of the character of the car or train, except as to trains not intended for passengers.

Carriers—Railroads—Passengers—Trespassers.†—Persons riding on trains not intended for passengers, contrary to the carrier’s rules, are trespassers, and even when riding by permission of the trainmen are bare licensees; and in case of injury to persons so carried the carrier is liable only when injury is caused by willful wrong or gross negligence.

Statutes—Construction—Re-Enacted Construed Provision.—Re-enactment of a statute construed by the highest court of the state implies adoption of such construction.

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see second foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556; first foot-note of *Washington, etc., Ry. Co. v. Trimyer* (Va.), 37 R. R. R. 114, 60 Am. & Eng. R. Cas., N. S., 114; last foot-note of *Indiana Union Traction Co. v. Keiter* (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; last foot-note of *St. Louis, etc., Ry. Co. v. Woods* (Ark.), 38 R. R. R. 404, 61 Am. & Eng. R. Cas., N. S., 404.

†For the authorities in this series on the subject of the care due passengers on freight trains, see last foot-note of *Usury v. Watkins* (N. C.), 36 R. R. R. 136, 59 Am. & Eng. R. Cas., N. S., 136.

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Carriers—"Trains for Both Passengers and Freight" and "Mixed or Accommodation Trains."—"Trains intended for both passengers and freight" and "mixed or accommodation trains" are synonymous.

Evidence—Judicial Notice—Character of Railway Trains.—The Supreme Court judicially knows what constitutes a "mixed or accommodation train;" that being a matter of common knowledge.

Carriers—Passengers—"Mixed or Accommodation Train."—A "mixed or accommodation train" is a train equipped to carry passengers as well as freight. In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business so far as necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers.

Carriers—Passengers—"Freight Train."—A "freight train," not intended for both passengers and freight, within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on such trains, is one on which passenger business is subordinated to the carriage of freight.

Appeal from Circuit Court, Choctaw County; G. A. McLean, Judge.

Action by Alice White against Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Daniel & Adams and *Alexander & Alexander*, for appellant.
Mayes & Longstreet, for appellee.

ANDERSON, J. This case was here on appeal once before. On the former appeal it will be found reported under the style *Illinois Central Railroad Company v. White*, 52 South. 449. On that appeal the case was reversed and remanded, on the ground that no liability was shown on the part of the railroad company; the court holding that the jury should have been instructed to return a verdict in its favor. On the second trial, at the conclusion of the testimony, the court instructed the jury at the instance of appellee to return a verdict in its favor, which was done, and judgment entered accordingly, from which appellant prosecutes this appeal.

[1] It is argued with great earnestness on behalf of appellant that the facts developed in this record are materially different from those shown on the first trial; that on the record here now it was a question for the jury whether the train on which appellant was injured was one "being intended for both passengers and freight," in the sense of the language used in section 4054, Code of 1906. After a most careful examination of the records

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on both appeals, we find there is no material difference in the facts as developed on the second trial from those shown on the first. The train on which appellant was injured was a regular local freight train, equipped with the ordinary appliances and conveniences of a local freight train, except that the car attached to it for the use of passengers was what is known as a "way car," with compartments for passengers, baggage, trainmen, and the tools and implements used in connection with the operation of a local freight train. It was neither a regular passenger train nor a "mixed or accommodation train." It is true that appellant in her testimony speaks of it as an "accommodation train;" but she also describes the character of the train, and her evidence, taken in connection with all the other evidence in the case, shows without material conflict that it was a local freight train, and not an "accommodation or mixed train." It follows that there was no error in directing the jury to return a verdict in favor of the railroad company.

[2] It is argued with great ability and show of reason on behalf of appellant (and it is contended in another case now in the consultation room involving this same question) that any freight train whatever which has attached to it a car for passengers to ride in, and on which passengers are invited to travel by the railroad company, is a freight train "intended for both passengers and freight." We are constrained to make an attempt to further elucidate the intent and purpose of the statute involved. The last clause of the statute (section 4054, Code of 1906) which is controlling in this case is in derogation of the common law. In determining the true interpretation of such a statute, it is a material aid to have in view the common law as it existed when the statute was enacted, in connection with the origin and history of the statute. According to the common law, the carrier owes the passenger the utmost degree of care for his safety, regardless of the character of the car or train on which he is being carried. There is no distinction in this respect between freight trains and regular passenger trains, provided such freight trains are used for the carriage of passengers.

[3] At common law there is only one class of trains in the operation of which the carrier is relieved from the exercise of the utmost degree of care for the safety of persons traveling on such trains, and that is those trains which are not intended for and which do not carry passengers. Persons riding on such trains contrary to the rules of the carrier are trespassers, and even when riding by permission of the trainmen in charge of such trains are bare licensees. 33 Cyc. 763, 764. In case of injury to persons so carried, the carrier is not liable unless such injury is caused by its willful or intentional wrong or gross negligence. 33 Cyc. 815. In this condition of the common law the Legislature enacted chapter 155, p. 264, Laws of 1876, as follows:

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"Whereas, certain railroad companies, doing business in this state, now refuse to carry passengers upon their freight trains, on account of the strict legal liability attaching to carriers of passengers; and whereas, such refusal on the part of said railroads to carry passengers upon their freight trains, results, generally, in great inconvenience, annoyance and loss to the citizens located upon the line of said roads: Therefore,

"Section 1. Be it enacted by the Legislature of the state of Mississippi, that all railroad companies, running trains in this state, shall hereafter carry upon their freight trains all passengers who shall desire to ride thereon, and who shall conform to the rules of said railroads applying to passengers upon passenger trains in relation to purchase of tickets, and so forth, and such passengers upon freight trains shall be furnished with the best accommodations that said freight trains may have at that time that such passengers may apply for passage: Provided, that railroads shall not be required to furnish passengers upon freight trains any additional accommodations to those which freight trains ordinarily have.

"Sec. 2. Be it further enacted—That, in case of damage or injury to any passenger or passengers, upon any freight train, the railroad company shall not be liable therefor, except upon proof of fraud, malice or gross negligence on the part of the company, its agents or employees: Provided, that the provisions of this section shall not apply to 'mixed' or 'accommodation' trains, so called, which are now run for the accommodation of both passengers and freight.

"Sec. 3. Be it further enacted—That any railroad company who shall refuse to carry upon any freight train, any person applying for passage thereon, who shall conform to the rules of the railroad prescribed for passengers upon passenger trains, shall forfeit and pay to the person so refused the sum of fifty dollars, to be recovered by action before any court of competent jurisdiction.

"Sec. 4. Be it further enacted—That the provisions of this act shall not apply to through freight trains run by telegraphic order."

This statute was revised and brought forward into the Code of 1880, forming section 1054 of that Code, which appears in the same language in section 3557 of the Code of 1892, and section 4054, Code of 1906, which is as follows: "Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable except for the gross negligence or carelessness of its servants." In *Perkins v. Railroad Co.*, 60

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Miss. 726, Judge Campbell, who prepared the original draft of the Code of 1880, speaking for the court, said: "The train on which the appellant was a trespasser was a 'freight train,' not being intended for both passengers and freight, within the meaning of section 1054 of the Code of 1880, and the action of the circuit court upon the instructions was correct. The latter part of that section is a substitute for section 2 of the act of March 15, 1876 (Acts 1876, p. 265), which employed the terms 'mixed' or 'accommodation' trains 'run for the accommodation of both passengers and freight.' A train which is strictly a freight train, with only the appliances of such a train, on which persons are not sought to be induced to take passage by the offer of other accommodations than are afforded by freight trains, cannot be said to be intended for both passengers and freight, although all persons may become passengers by going into the conductor's caboose. They who take passage on such a train cannot expect, and have no right to demand, the conveniences and attention required with respect to passenger trains or those intended by the carrier for both freight and passengers."

It will be noted that the court says in that case that the latter part of section 1054, Code of 1880, is a substitute for section 2 of the act of 1876, *supra*. In the case of *I. C. R. R. Co. v. Trail*, 25 South. 863, the court speaks of the train on which the injury occurred as a through freight train. We have examined the record in that case, and find that it was a freight train which did not stop at all stations; but the appellee, Trail, testified, that it carried passengers, tickets were sold for it, and he paid the conductor on this occasion because he had not time to purchase a ticket, and that it had attached to it a regular passenger caboose. The court held that the railroad was only liable for gross negligence because the train in question was not "designed to carry passengers." We understand the court to hold, in *Perkins v. Railroad*, *supra*, that the proviso to section 2 of the act of 1876 means the same thing as the latter part of section 1054, Code of 1880 (section 3557, Code of 1892, and section 4054, Code 1906). The evident purpose of the Legislature in the adoption of this statute was to relieve railroad companies from the exercise of the highest degree of care as to passengers on all freight trains whatsoever, except "mixed or accommodation trains," which were left as at common law.

[4] Since the construction put on this statute in *Perkins v. Railroad Company*, *supra*, it has been twice re-enacted in the same language in the Codes of 1892 and 1906. The rule is that where a statute has been construed by the highest court of a state, and afterwards, re-enacted in substantially the same terms, the Legislature by such re-enactment adopts, along with the statute, such construction.

[5, 6] What is intended by the language "intended for both

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passengers and freight," or "mixed or accommodation trains," which are synonymous in meaning? The court knows what a "mixed or accommodation train is, for everybody knows. It is a matter of common knowledge, of which the court takes judicial notice.

[7] In section 2 of the act of 1876, *supra*, the words "mixed," or "accommodation" are put in quotations, and are referred to as "so-called," showing that it was a matter of general understanding at that time what class of trains was intended to be covered by the proviso to that section. A "mixed or accommodation train" is a train equipped and having the appliances and facilities suited for the carriage of passengers as well as freight. Its purpose and business is as much the one as the other. In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business to the extent necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers.

[8] On the other hand, a freight train, not intended for both passengers and freight, or which is not a "mixed or accommodation train," in the meaning of this statute, is a regular freight train on which passengers are invited to travel, having for their own convenience a caboose, way car, or passenger coach attached but has none of the other equipment or appliances of a regular passenger train, beyond what all freight trains have, and in making its schedule does not make connection with other trains on its line or those of connecting carriers, if prevented by the proper handling of its freight business; in other words, a train on which a passenger business is subordinated to that of the carriage of freight—a train the paramount object of which is the carriage of freight, and not of passengers.

It might be in some cases a question of fact for the jury whether a given train is one intended for both passengers and freight in the meaning of this statute. But where the evidence shows without conflict, as it does in this case, that the train in question was not a "mixed or accommodation train," but a regular local freight train, carrying passengers as a mere incident, there is no question for the jury.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. *et al.* v. PURIFOY.

(Supreme Court of Arkansas, June 5, 1911.)

[138 S. W. Rep. 631.]

Carriers—Carriers of Passengers—Degree of Care Required.*—

The care required of railroad companies toward their passengers is the highest degree of care which a prudent and cautious man would exercise, and which is reasonably consistent with their mode of conveyance and the practical operation of their roads, and they are not bound to exercise the utmost diligence human skill and foresight can effect, consistent with the mode of conveyance, or liable for the slightest omission in this respect.

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by M. W. Purifoy against the St. Louis, Iron Mountain & Southern Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

W. E. Hemingway, E. B. Kinsworthy, Bridges, Wooldridge & Gantt, and J. H. Stevenson, for appellants.

M. S. Cobb, for appellee.

WOOD, J. This is an appeal from a judgment for \$2,500, in favor of the appellee, for personal injuries alleged to have been received by him, while a passenger in a Pullman car from St. Louis to Hot Springs, by being thrown by a lurch or jerk of the train, whereby, as he was coming from the toilet room to the smoker and lavatory, he was thrown against the door of the toilet room and his neck injured. He claims to have a tubercular infection of the neck, which has made it necessary to have it lanced or operated upon several times, and that it has seriously impaired his health.

Appellant urges a reversal because the court gave the following prayer for instruction: "(1) The degree of care required by law of a railroad company for the safety of its passengers is the utmost diligence which human skill and foresight can affect, consistent with the mode of conveyance and the practicable operation of its railroads, and if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation or the mode of management at the time the damage occurs, the railroad companies are responsible; and in this case, if you believe from the evidence that plaintiff, while a passenger on defendant's train, and while in the exercise of reasonable care, was injured because of the failure of the defendant to use such care, as above defined, for his safety, then you should find for the plaintiff."

*See first foot-note of preceding case.

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The specific objections made to the giving of the instruction are as follows: "(1) Because of the use of the words 'utmost diligence which human skill and foresight can effect,' instead of the 'highest degree of care which a prudent and cautious man would exercise.' (2) Because the word 'reasonably' is not used just precedent 'consistent,' so as to make the degree of diligence required reasonably consistent with the mode of conveyance and operation of the road. (3) Because of the use of the words 'slightest omission in regard to the highest perfection of all the appliances of transportation or the mode of management,' instead of 'the failure to use the highest degree of care which a prudent and cautious man would exercise, and which is reasonably consistent with the mode of conveyance and the practical operation of the road.'"

"The care exacted of railway companies toward their passengers is the highest degree of care which a prudent and cautious man would exercise, and that which is reasonably consistent with their mode of conveyance and the practical operation of their roads." *Railway Co. v. Sweet*, 60 Ark. 550, 557, 31 S. W. 571; *Railway Co. v. Sweet*, 57 Ark. 287, 21 S.W. 587; *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; *Ark. Midland Ry. Co. v. Cannon*, 52 Ark. 517, 524, 13 S. W. 280. In the last case Judge Battle, speaking for the court, announced the following rule: "Railroad companies are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track and in all the subsidiary arrangements necessary to the safety of the passengers. While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger, reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to adopt the highest degree of practicable care, diligence, and skill that is consistent with the operating of their roads and that will not render their use impracticable or inefficient for the same."

The above is the correct rule. 2 Hutch. on Carriers, § 897. The instruction did not conform to the above rule, and is in conflict with many of our later decisions. True, the instruction contained language that was used in *George v. St. L., I. M. & S. Ry. Co.*, 34 Ark. 613, 615, and *Eureka Springs Ry. v. Timmons*, 51 Ark. 459, 467, 11 S. W. 690, and in *St. L., I. M. & S. Ry. Co.*

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v. Oliver, 92 Ark. 423, 123 S. W. 662. In the last-mentioned case the court inadvertently quoted with approval the language used in the earlier cases of *George v. St. L., I. M. & S. Ry. Co.* and *Eureka Springs Ry. v. Timmons*, *supra*. But the language quoted by us in *St. L., I. M. & S. Ry. Co. v. Oliver*, 92 Ark. 434, 435, 123 S. W. 662, from the earlier case of *George v. St. L., I. M. & S. Ry. Co.*, 34 Ark. 613, does not state the rule correctly, and this language had been disapproved and departed from in the cases mentioned in the beginning of this opinion. These cases (quoted in the beginning of this opinion) state the rule correctly, and we adhere to the rule as therein announced. The language referred to above in *St. L., I. M. & S. Ry. Co. v. Oliver*, 92 Ark. 434, 435, 123 S. W. 662, was not necessary to the decision of that case, and we again disapprove it. The language of the instruction under consideration, in effect, makes carriers of passengers insurers of the perfect safety of the operation of their trains, and absolutely liable for any injuries that may result to their passengers. In other words it virtually makes the carriers insurers. This is not the law.

For the error in giving the instruction, the judgment is reversed, and the cause is remanded for new trial.

SUNDERLAND BROS. CO. v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Nebraska, June 26, 1911.)

[131 N. W. Rep. 1047.]

Carriers—Injury to Freight—Liability.*—The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy.

Carriers—Injury to Freight—Act of God—Concurrent Negligence.†—If the carrier needlessly delays the shipment or negligently fails to protect it from known or threatened danger, and the goods are overtaken in transit and are damaged or destroyed by an act of God, and such negligence or unreasonable delay is the proximate or concurring cause of the injury or destruction, the carrier is liable for the

*See last foot-note of *Trakas v. Charleston, etc., Ry. Co. (S. C.)*, 38 R. R. R. 711, 61 Am. & Eng. R. Cas., N. S., 711; first head-note of *Colsch v. Chicago, etc., Ry. Co. (Iowa)*, 37 R. R. R. 453, 60 Am. & Eng. R. Cas., N. S., 453; last head-note of *Kansas City, etc., Ry. Co. v. Cox (Okla.)*, 36 R. R. R. 104, 59 Am. & Eng. R. Cas., N. S., 104; second head-note of *White v. Minneapolis & R. R. Co. (Minn.)*, 36 R. R. R. 747, 59 Am. & Eng. R. Cas., N. S., 747; first foot-note of *Chesapeake & O. Ry. Co. v. Hall (Ky.)*, 34 R. R. R. 468, 57 Am. & Eng. R. Cas., N. S., 468; last head-note of *Jones v. Atlantic C. L. R. Co. (N. C.)*, 31 R. R. R. 68, 54 Am. & Eng. R. Cas., N. S., 68.

†See last foot-note of *Chicago, etc., Ry. Co. v. Miles (Ark.)*, 35 R. R. R. 134, 58 Am. & Eng. R. Cas., N. S., 134

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loss; and this rule applies whether the goods are perishable or non-perishable in their nature.

Carriers—Excessive Freight Charge—Evidence.—Evidence examined, and held insufficient to sustain that part of the judgment which is based on an alleged excessive freight charge.

(Syllabus by the Court.)

Appeal from District Court, Douglas County; Kennedy, Judge.

Action by the Sunderland Bros. Company against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed, on condition.

Greene, Breckenridge & Matters, for appellant.

Baldridge, De Bord & Fradenburg, for appellee.

BARNES, J. The plaintiff commenced an action in the district court of Douglas county against the defendant, a common carrier, to recover damages for negligence and delay in the transportation of 12 car loads of lime which plaintiff alleged caused its destruction by the flood of June, 1903, while in the defendant's yards at Kansas City, Mo. Plaintiff also commenced another action against the defendant to recover the amount of an alleged overcharge or excessive rate charge and collected for the transportation of certain cement from Hannibal, Mo., to South Omaha, Neb., in June and July, 1906. The actions were consolidated and tried together. The plaintiff had the verdict on both causes of action and from a judgment on the verdict the defendant has appealed. The appeal is presented as though the record contained two cases, one designated as the flood case and the other as the rate case. We adopt the defendant's classification, and will consider the questions in the order in which they have been presented.

In the flood case it is contended that the district court erred in refusing to direct the jury to return a verdict for the defendant at the close of all of the evidence. It appears that in May, 1903, the plaintiff purchased of the Western White Lime Company 12 car loads of lime, put up in barrels and delivered to the purchaser f. o. b. the cars of the St. Louis & San Francisco Railroad Company, commonly called the Frisco Line, at Ashgrove, with express instructions from the plaintiff that the same be routed to its destination by way of Kansas City, and over that part of defendant's railroad known as the "K. C." line. Three cars of this lime were delivered to the defendant at its yards in Kansas City, Mo., on the 26th day of May, 1903, and the remaining nine cars were delivered to and received by the defendant at that place from May 26th to May 30th, inclusive; that during the time of such delivery the country drained by the Kaw river and its tributaries was being flooded by heavy rains which continued from

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day to day until the 31st day of May, at which time an unprecedented flood of water reached Kansas City, completely flooding the defendant's yards, in which all of the cars of lime were situated, and which resulted in its complete destruction. The trial court instructed the jury that the flood above mentioned was so great, unprecedented, and unusual as to amount to an act of God, and that, in order to entitle the plaintiff to recover, it was required to show that some act of negligence on the part of the defendant, which, concurring with the act of God, was the proximate cause of the loss and damage complained of. It is contended on the part of the defendant that it was not guilty of any negligence, and that under the circumstances, as disclosed by the testimony, it was not chargeable with negligence in failing to seasonably forward the lime to its place of destination, and thus escape the flood above described. It appears, however, that as early as May 25th the weather bureau forecaster at Kansas City sent out warnings to the people and the railroad officials of the approach of the flood. This it continued to do from day to day and time to time, and on the 29th day of May the following warning was prepared on postal cards, and mailed to all points between St. Joseph and Boonesville, Mo. "May 30, 1903. Stage of the Missouri at 7 A. M. at Kansas City 25.0 feet and still rising. This is more serious than the flood of 1892, and only about one foot below the stage of 1881. Heavy rains in Missouri and eastern Kansas last night renders the situation more alarming for points below Kansas City." The transportation companies were also warned that it would be well for all interested to be prepared for emergencies. On May 31st it was stated by the weather forecaster at Kansas City that: "No reports of any kind received. Cut off from telegraphic and telephonic communication, except to the eastward, nothing could be said except what was actually happening in this vicinity." Warnings were sent out to the heads of the railroads informing them of the increasing danger as early as May 28th, stating that interests affected by high water should be closely guarded. It is admitted that those warnings were received by the officials and employees having supervision and charge of the traffic of the defendant's road at Kansas City. Notwithstanding such warnings and the daily newspaper reports of the magnitude of the approaching floods, the defendant took no steps to remove the cars containing the lime in question to higher ground, and failed and neglected to forward them to their place of destination, or in any manner remove them from flood danger. It appears that the traffic between Kansas City and Omaha by way of the Kansas City line was interrupted for some of the time in question by washouts at or near St. Joseph, but it also appears that the defendant forwarded freight amounting to some 30 or 35 cars per day of what it called perishable goods from Kansas City to Omaha, and that it could

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have routed the lime in question by way of Chariton, Iowa, to its place of destination. Again, it is well known that by exposure to floods white lime is of a most perishable nature.

[1, 2] From the foregoing it appears that this case is fairly within the rule announced in *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823, where the facts were practically the same as those in the case at bar. It there appeared that one Sharpe delivered to the railway company at La Fayette, Ind., some household goods for shipment to Lincoln, Neb. The goods were shipped from La Fayette on the 21st day of May, 1903, and were delivered to the Missouri Pacific Railway Company, the connecting carrier at Kansas City on the 26th day of May, which was the same day that the first three cars of the lime in question herein were delivered to the defendant. The household goods were held in the yards by the Missouri Pacific Railway Company until May 31st, when they were injured by the same flood that destroyed the plaintiff's lime. Action was brought to recover the value of the goods. The plaintiff had judgment, and on appeal to this court it was said: "It is claimed by the railroad company, that they shipped the goods within a reasonable time, and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claims. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, excepting only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability. (2) It may be conceded in the present case that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus at fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by the act of God where the goods were exposed to injury by the carrier's inexcusable detention." In the instant case it would seem, in the absence of any reasonable showing to the contrary, that the delay of five days or more in the yards at Kansas City was an unreasonable delay in the transportation of the plaintiff's lime, and, when we consider the evidence that the officer in charge of the weather bureau at Kansas City from May 25th to May 31st daily and frequently notified the public and the railroad com-

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panies of the coming flood, of the constant and increasing rains throughout the territory drained by the Kaw river, upon the banks of which the defendant's yards at Kansas City are situated, there would seem to be no doubt of the negligence of the defendant in not removing the plaintiff's lime to higher ground as a place of safety, or in failing to forward them to Omaha, although it became necessary to do so over a different road than the one by which they were billed. It may be said in view of the repeated warnings of approaching danger that, if the defendant was unable to immediately forward the lime to its destination, it should have notified the Frisco line of that fact, and refused to receive it, which was the course pursued at that time by the other railroads centering in Kansas City, shown by the testimony of the defendant's witnesses.

It appears that the flood of May, 1903, at Kansas City, Mo., has resulted in a great many actions against the different railroad companies transacting business in that city; and it appears without exception that the courts of last resort of the several states where such actions have been brought have held the transportation companies liable for its consequences. In *Pinkerton v. Missouri P. R. Co.*, 117 Mo. App. 288, 93 S. W. 849, the court said: "A carrier is liable for loss of freight from a flood, if it was aware of its approach in time to remove the goods to a place of safety by the exercise of ordinary care and diligence." It was held that the evidence in that case was sufficient to go to the jury on the question of the defendant's negligence in not taking the goods to a place of safety after it knew of the approach of the flood. To the same effect is *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509, 110 Am. St. Rep. 361. In that case it was said: "It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on May 23d, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from the defendant's yards on any day after its arrival prior to May 29th, and, had this been done, the corn would not have been damaged. If the defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense." See, also, *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882,

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which is another of the flood cases. We are therefore of opinion that the court properly refused to direct a verdict for the defendant.

Complaint is made of the court's fourth instruction, but in view of the foregoing this complaint is not well founded. We find no error in the record which affects the verdict and judgment in what is called the flood case, and to that extent the judgment of the district court should be affirmed.

[3] It appears that the so-called rate case was brought to recover the sum of \$245.10, an alleged overcharge for the transportation of 13 cars of cement from Hannibal, Mo., to South Omaha, Neb., in June and July, 1909. It was stated in the petition, in substance, that the cement was sold to and used by the Union Stockyards Company at South Omaha; that the published tariff of the defendant prescribed a rate of $7\frac{1}{2}$ cents per hundred weight on cement in car load lots where such cement is used for steam railroads, but that, disregarding this tariff, the defendant required the plaintiff to pay at the rate of 10 cents per hundred pounds for the transportation of this cement, and judgment was prayed for the amount of the alleged overcharge. The answer contains a general denial. At the trial it was admitted that he published tariff (Exhibit 14), as shown by the record, was in force at the time of the transaction complained of, and that the $7\frac{1}{2}$ -cent rate was limited to railway material and supplies for steam railroads for their own use. The tariff sheet is unambiguous in its terms, and provides a rate for west-bound railway material and supplies (except powder and high explosives, rails, and fastenings) for steam railroads only, C. L. $7\frac{1}{2}$ -cents, while the rate to others is fixed therein at 10 cents per hundred pounds. Upon the introduction of the evidence, it appeared that the plaintiff was at the times mentioned a corporation existing under the laws of this state engaged in commerce, and among other things in the purchase and sale of lime, cement, coal, and similar commodities, and had its principal place of business in Omaha, Neb. Mr. Sunderland testified that his company bought the cement and sold it to the stockyards company. He further testified that the cement was bought by the company for its own commercial purposes, and that it was bought for resale. No claim is made that the tariff was discriminatory, and plaintiff seems to rely wholly on the facts which it insists brings the transaction within the $7\frac{1}{2}$ -cent rate; while the defendant contends that it clearly falls within the 10-cent rate, and to that end requested the district court to instruct the jury to return a verdict in its favor. This request was denied, and the jury were instructed to return a verdict for the plaintiff. Obeying this instruction, a verdict was returned against the defendant for the sum of \$323.30, which amount was included in the judgment complained of by the defendant.

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It is contended that the court erred in refusing to give the instruction requested by the defendant, and to our minds this contention is well founded. It seems clear from even a casual reading of the tariff that the $7\frac{1}{2}$ -cent rate was limited exclusively to railway material and supplies for steam railroads only and for their own use; that the plaintiff purchased the cement in question for the purpose of resale, not to steam railways only, but to any one who might have use for that sort of material. By the terms of the tariff the defendant was entitled to charge and receive for transporting it 10 cents per hundred pounds. This rate was fixed and certain, and the company was entitled to know that such would be the compensation for its services. We are therefore of opinion that the plaintiff was not entitled to demand the lesser rate, which applied only to material billed to steam railways for their own exclusive use. It must be observed that this cement was shipped at the 10-cent rate, and the plaintiff does not contend that there was any express contract or arrangement with the defendant that $7\frac{1}{2}$ -cent rate was to apply to this shipment. It simply makes this claim under its construction of the meaning of the tariff.

We think that neither the language of the tariff nor the facts warrant such a construction. It is urged that the Union Stockyards Company is a steam railway within the meaning of the tariff, and therefore plaintiff was entitled to the $7\frac{1}{2}$ -cent rate; but this contention is beside the mark, for, until the cement was actually received by the stockyards company, plaintiff could have diverted the shipment and required its delivery to any other customer. On the other hand, it is contended by the defendant that, even if the Union Stockyards Company is to be considered a steam railway, still as a matter of fact the cement was not used for the purpose of railway construction. As we view the situation, it is unnecessary to consider these questions. We are of opinion that the defendant was entitled to receive and collect from the plaintiff the usual 10-cent rate for this shipment, and that the district court erred in refusing to direct a verdict in its favor upon this cause of action. It follows that so much of the judgment of the district court as represents the recovery in the rate case should be reversed, and that cause of action should be dismissed; but, as to the so-called flood case, the judgment of the district court should be affirmed. The plaintiff is therefore allowed to file a remittitur with the clerk of this court for the sum of \$323.30 within 40 days, and upon the filing of such remittitur the judgment of the district court will stand affirmed; but, upon the failure to do so, the judgment of the district court will be reversed, and the cause remanded for further proceedings.

Judgment accordingly.

SEDWICK, J., took no part in this decision.

GULF, C. & S. F. RY. CO. *et al.* v. STATE *ex rel.* CALDWELL.

(Supreme Court of Oklahoma, May 9, 1911.)

[116 Pac. Rep. 176.]

Commerce—Interstate Commerce—Shipment of Intoxicating Liquors.*—It is not within the power of the state courts to enjoin interstate carriers from receiving at points without the state for transportation to and delivery to consignees at points within the state shipments of spirituous, vinous, fermented, and malt liquors and imitations thereof, "to persons who they well know, immediately upon receiving possession thereof, intended to use said liquors in violation of the laws of the state," including certain persons therein alleged to have paid the "special tax required by the United States of liquors dealers," or "to any other person after said defendant handling the shipment has been reliably informed from credible source, either by circumstances or otherwise, that such person is a person who does not intend said shipment of liquor for his personal or family use, but in violation of the law of the state," said shipments being articles of interstate commerce.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by the State, on the relation of Fred S. Caldwell, against the Gulf, Colorado & Santa Fé Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Cottingham & Bledsoe, R. A. Kleinschmidt, C. O. Blake, C. L. Jackson, Edgar A. De Meules, C. E. Warner, and Edward R. Jones, for plaintiffs in error.

Fred S. Caldwell, for defendant in error.

WILLIAMS, J. On the 14th day of September, A. D. 1910, the defendant in error as plaintiff, by Fred S. Caldwell, as counsel to the Governor, against the plaintiffs in error as defendants, commenced in the superior court of Oklahoma county an action to restrain them as interstate carriers from receiving at points without the state shipments of spirituous, vinous, fermented, and malt liquors, and imitations thereof, for transportation to and delivery at points in this state, "to persons who they well know, immediately upon receiving possession thereof, intended to use said liquors in violation of the laws of the state," including certain persons therein alleged to have paid the "special tax re-

*For the authorities in this series on the subject of the transportation of intoxicants into prohibition territory, see foot-note of *Commonwealth v. Louisville, etc., R. Co. (Ky.)*, 37 R. R. R. 727, 60 Am. & Eng. R. Cas., N. S., 727.

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quired by the United States of liquor dealers," or "to any other person after said defendant handling the shipment has been reliably informed from credible source, either by circumstances or otherwise, that such other person is a person who does not intend said shipment of liquor for his personal or family use, but, on the contrary, intends to use and dispose of same in violation of the laws of the state of Oklahoma." That Fred S. Caldwell, as counsel to the Governor, was authorized to bring this suit in the name of the state, has been settled by the Criminal Court of Appeals, and such holding has been followed by this court. Counsel for the defendant in error in his brief says: "If such liquor shipments are the subject of legitimate commerce between the states, then certainly they cannot be enjoined. It would be an insult to the intelligence of this honorable court to argue that a legitimate commerce transaction or any lawful and proper act of the interstate carrier to be done and performed in connection therewith could be enjoined by a state court or any other court." From this concession it naturally follows that, if intoxicating liquors are the "subject of legitimate commerce between the states," this cause should be reversed and the temporary injunction dissolved. In *Commonwealth v. People's Express Co.*, 201 Mass. 564, 88 N. E. 420, 131 Am. St. Rep. 416, it is said: "The Wilson act, as interpreted by the Supreme Court of the United States, insures delivery to the consignee of intoxicating liquor which is transported as interstate commerce free from and regardless of all prohibitive statutes of the several states. As pointed out above, such delivery may be at the residence or place of business of the consignee as well as at some common depot of consignment. The liquor is safe from state laws, until it passes into the actual or constructive possession of the consignee. *Rhodes v. Iowa*, 170 U. S. 412 [18 Sup. Ct. 664, 42 L. Ed. 1088]; *Vance v. Vandercook Co.* (No. 1) 170 U. S. 438 [18 Sup. Ct. 674, 42 L. Ed. 1100]; *American Express Co. v. Iowa*, 196 U. S. 133 [25 Sup. Ct. 182, 49 L. Ed. 417]; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17 [25 Sup. Ct. 552, 49 L. Ed. 925]; *Foppiano v. Speed*, 199 U. S. 501 [26 Sup. Ct. 138, 50 L. Ed. 288]; *Heyman v. Southern Railway Co.*, 213 U. S. 207 [27 Sup. Ct. 104, 51 L. Ed. 178]; *Adams Express Co. v. Kentucky*, 206 U. S. 129 [27 Sup. Ct. 606, 51 L. Ed. 987]. If the statute was construed as applying to interstate commerce, it would constitute a restriction upon its freedom and therefore would be beyond its power." See, also, to the same effect, *State v. Eighteen Casks of Beer et al.*, 24 Okl. 786, 104 Pac. 1093, 25 L. R. A. (N. S.) 492; *St. Louis & S. F. R. Co. v. State*, 26 Okl. 300, 109 Pac. 230; *In re Lebolt* (C. C.) 77 Fed. 587; *Ex parte Jervev* (C. C.) 66 Fed. 957; *In re Langford* (C. C.) 57 Fed. 570. In *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972, a state statute (Ky. St. 1908, § 1307) providing for the pun-

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ishment of any party knowingly furnishing intoxicating liquor to an inebriate as applied to the transportation of liquor by an express company from state to state being under consideration, the court said: "Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. License Cases, 5 How. 504, 577, 12 L. Ed. 256, 289; *Leisy v. Hardin*, 135 U. S. 100, 110, 10 Sup. Ct. 681, 34 L. Ed. 128, 132, 3 Interst. Com. R. 36. In *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 444, 18 Sup. Ct. 674, 676, 42 L. Ed. 1100, 1103, Mr. Justice White, delivering the opinion of the court, said: 'Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence that a state law which denies such a right or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.' That the transportation is not complete until delivery to the consignee is also settled. In *Rhodes v. Iowa*, 170 U. S. 412, 426, 18 Sup. Ct. 664, 669, 42 L. Ed. 1088, 1096, it was held that the Wilson act (Act Aug. 8, 1890, 26 Stat. at L. 313, c. 728 [U. S. Comp. St. 1901, p. 3177]) 'was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee.' This legislation is in the exercise of the police power—a power which, generally speaking, belongs to the state—and is an attempt, in virtue of that power, to directly regulate commerce; but, in case of conflict between the powers claimed by the state and those which belong exclusively to Congress the former must yield, for the Constitution of the United States and the laws made in pursuance thereof are 'the supreme law of the land.' Section 5258 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3564) provides: 'Every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * all passengers * * * freight, and property on their way from any state to another state, and to receive compensation therefor.' *New Orleans Gaslight Co. v. Louisiana Light & H. P. Mfg. Co.*, 115, U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Wabash, S. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, 1 Interst. Com. R. 31. In *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 334, 28 Sup. Ct. 121, 123, 52 L. Ed. 230, 234, it was declared 'that any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution.' In *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135, 27 Sup. Ct. 606, 607, 51 L. Ed. 987, 991, it was said: 'The testimony showed

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that the package containing a gallon of whisky was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Ky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the Court of Appeals, and is beyond dispute under the decisions of this court.' Clearly, within the cases above cited, the statute before us, as applied to transportation from state to state, cannot be sustained." That intoxicating liquors, when consigned to points where their sale is prohibited by state laws, are subject of interstate commerce, is also settled by the following authorities: *State v. Intoxicating Liquors*, 102 Me. 385, 67 Atl. 312, 120 Am. St. Rep. 504; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. In *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 172 Fed. 117, 96 C. C. A. 322, the United States Court of Appeals for the Seventh Circuit held that a state statute prohibiting carriers from carrying intoxicating liquors into any county or district wherein the sale of such liquors is prohibited by state law, as applied to shipments from other states, is void as an attempted regulation of interstate commerce, and affords no justification for the refusal of a railroad company, although a corporation of such state, to receive and carry such shipments. In *United States ex rel. Friedman et al. v. United States Express Co.* (D. C.) 180 Fed. 1006, it was also held that, where an express company doing interstate business refused shipments of intoxicating liquors offered by relators in Arkansas for transportation to purchasers in that portion of Oklahoma formerly called the Indian Territory, relators were entitled under such section to invoke the aid of mandamus to compel the express company to receive, transport, and deliver such liquors as an article of commerce not prohibited by federal law from being introduced into that part of Oklahoma to which it was consigned. See, also, *Crescent Liquor Co. et al. v. Platt* (C. C.) 148 Fed. 894; *Davis Hotel Co. v. Platt* (C. C.) 172 Fed. 775; *Danciger et al. v. Wells Fargo Express Co.* (D. C.) 154 Fed. 379; *Cin., N. O. & T. P. R. Co. v. Commonwealth*, 126 Ky. 563, 104 S. W. 394; *State v. Kenney*, 62 W. Va. 284, 57 S. E. 823. Section 239 of the federal Penal Code (U. S. Comp. St. Supp. 1909, p. 1464), passed by Congress in the exercise of an expressly delegated power, is a recognition without any exception of intoxicating liquors as a subject or article of interstate commerce. *Commonwealth v. People's Express Co.*, supra. What is legitimate commerce between the states does not depend upon state policy. The framers of the federal Constitution in section 9, art. 1, expressly delegated this power to the federal government. The attempt is now made to do that through the agency of the state judiciary, which counsel for the defendant in error concedes could not be accomplished by state legislation.

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If the state judiciary possesses this distinct power, an anomaly, is presented in the relation of the several states to the Union. If the state courts, exercising the powers of chancery, are empowered to determine what is legitimate interstate commerce so as to prevent an interstate carrier from receiving an article in another state that is recognized, not only by the laws of that state, but also by those of the federal congress, as being an article of commerce, and transporting the same into this state, and delivering it to the consignee on the ground that under the laws of this state it is unlawful to manufacture or sell same within the state, then it is within the power of the state to destroy commerce between the states. That is just what the framers of the federal Constitution intended they should not be permitted to do. In the days of the Confederation the conflicting authority between the different colonies as to commerce on the navigable rivers and canals lying between the different colonies caused complications. This brought about a realization of the necessity of lodging the power "to regulate commerce to foreign nations and among the several states and with the Indian tribes" with the federal government.

The argument of counsel for the defendant in error is based on an erroneous application of his premise. Let it be conceded that a contract made by a citizen of the state of Oklahoma with a licensed liquor dealer in Kansas City, Mo., for the purchase of intoxicating liquors to be there delivered to the interstate carrier for the vendee, and to be transported by such carrier to a point in Oklahoma, and there delivered by it to said vendee, who intends vending it contrary to the laws of said state, the Kansas City liquor dealer, from the beginning, knowing of such unlawful purpose on the part of the vendee, may not be enforced in the courts of this state, on the grounds of public policy. Yet it does not follow that said liquors are not the subject or articles of interstate commerce. On delivery to the interstate carrier for the vendee by the vendor, the sale was consummated, and such liquors then and there became the property of the vendee, subject to any lien that the carrier might have thereon for the transportation charges. In that state the sale was lawful, and, without a dissenting authority under such a state of facts, intoxicating liquors are property. License Cases, 5 How. 504, 12 L. Ed. 256; *Eidge v. City of Bessemer*, 164 Ala. 599, 51 South. 246, 27 L. R. A. (N. S.) 394; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Wynehamer v. People*, 13 N. Y. 384; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299; *Lincoln v. Smith*, 27 Vt. 328; *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847. True, laws enacted under the exercise of police power for the public welfare may in a sense impair property rights in intoxicating liquors by way of preventing the sale thereof, or the storing of the same at des-

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ignated places or holding the same for sale, or any other unlawful purpose, making such acts a nuisance, misdemeanor, or felony, and subject to criminal punishment. But such state laws do not attach until the delivery of the same to the consignee within the state by the interstate carrier. It cannot be successfully maintained that such laws attach to the liquor without the state, and have an extraterritorial effect so as to make it unlawful for the interstate carrier to receive such shipment in another state for delivery in this state. No authority has been cited to that effect, and none can be found. The opposite in law is a truism. And even the knowledge of the interstate carrier that after delivery thereof it will be used contrary to the state law, if the carrier making such delivery acts reasonably within the scope of its duty as a carrier, does not change the rule. *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972, *supra*.

Let it be supposed that it is against the law of this state for hardware merchants to sell pistols within the state. A hardware merchant buys a lot of pistols in Pittsburg, Pa., from the manufacturer with a view of having the same transported by an interstate carrier to a point in Oklahoma for delivery to himself, where he intends vending the same contrary to the state statute, and that the manufacturer or the vender has knowledge of such intention. Can it be maintained that the state of Oklahoma can enjoin such interstate carrier from receiving such lot of pistols without the state and delivering such interstate shipment to the vendee in Oklahoma? The vendee has a property right in the intoxicating liquors, just as he has in the pistols. While the state under the exercise of the police power for the benefit of the public may impair such property right in the pistols and intoxicating liquors to the extent of regulating or prohibiting the sale, but when it comes to a complete taking of such property right, such can be done only by due process of law which guarantees the owner of the property his day in court. If the vendee under the laws of Oklahoma has forfeited his right of ownership of such intoxicating liquors, such forfeiture must be determined in a judicial way by due process of law by giving him reasonable notice and a hearing and finding and adjudication being had thereon. That can only be done after the state laws have attached. It is conceivable that, because the contract for the sale of the liquor in such case will not be enforced in the courts of this state on the grounds of public policy, said liquors lost all character of property. Vessels engaged in smuggling contrary to law are subject to confiscation, but that does not the less render them property. On account of the violation of the law, such law operates against the remand by proper procedure. The title is divested from the owner and invested in the government for the benefit of the public when it may be de-

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stroyed. So it is with any vessel, goods, wares, or merchandise seized by the United States officers of customs and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels. 3 Fed. Stat. Ann., § 923, p. 96 (U. S. Comp. St. 1901, p. 686). Likewise it is with vehicles, horses, and teams used by vendors in the unlawful introduction and sale of whisky on Indian reservations. Not only the intoxicating liquors, but also such vehicles and teams, are subject to forfeiture and confiscation. But in all such instances reasonable notice and hearing is contemplated so as to meet the requirements of due process of law. And such was the case with vessels in former centuries engaged in the slave trade contrary to law. In such cases the law operated against and fastens upon the rem and by due process divests the title from the owner and invests it for the benefit of the public.

It being conceded by the counsel for the defendant in error that under section 8, art. 1, of the federal Constitution the Legislature of the state is without power to enact a law so as to prevent an interstate carrier from receiving a shipment of intoxicating liquors without the state and transporting it to a point within the state and delivering the same to the consignee, what is the difference in such legislative powers and the co-ordinate judicial powers? The Legislature acts in future declaring the rule of law; the judiciary, on what exists, beginning after the exercise of legislative power has been completed. It having determined what the statute means and applied the facts to it renders a decree thereon. The judiciary can enact no law, but having made a determination as to what the law is which comes to us in this state by enactment, for the Constitution is an enacted organic law, the statute an enacted legislative measure, and the common law transplanted by the legislative enactment, enters a decree thereon. The law is the mater of the courts, which act under its terms. They are powerless to prevent the receiving of a shipment of intoxicating liquors by a carrier at a point in another state and transporting the same to a point in this state and there to be delivered, unless some valid law exists forbidding such acts on the part of such carrier. It being conceded that the Legislature cannot enact such a law, it would be an act of usurpation on the part of the judiciary to attempt to exercise a power which clearly it does not possess. That intoxicating liquors are the subject of articles of interstate commerce having been so decided repeatedly by the Supreme Court of the United States, we are bound thereby. Article 6 of the federal Constitution. Said court determines the meaning of the acts of Congress and of the federal Constitution, and, when it is necessary for the same to be applied by the state courts, they must follow such construction. The state courts upon purely

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state matters determine the meaning of the state constitutions and statutes, and likewise the federal courts in applying the same as a rule follow the state construction. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. —.

This was the intention of the fathers that builded this republic. By this means the harmony between delegated federal and reserved state powers is preserved. Neither should the former encroach upon the latter because they are weak, nor the latter upon the former because a temporary advantage may flow therefrom. When the legal path as to federal questions has already been blazed, there is nothing for state courts to do but as faithfully as possible to follow therein.

The judgment of the lower court is reversed, and remanded, with instructions to dismiss the petition. All the Justices concur.

ST. LOUIS, I. M. & S. RY. CO. v. WOOD *et al.*

(Supreme Court of Arkansas, June 5, 1911.)

[138 S. W. Rep. 461.]

Carriers—Carriage of Goods—Act of God.*—A railroad company whose track was washed out by a flood is not liable to a shipper of live stock because it could not carry the live stock to the destination; the washout being an act of God.

Carriers—Carriage of Live Stock—Duty to Transport—Estoppel.—Where a flood washed out the railroad track making it impossible to carry a shipment of live stock to the destination and the shipper assented to a change of route and a diversion to another point, he was estopped from claiming damages arising out of this diversion.

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

Action by E. B. and William Wood against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Modified and affirmed.

The appellees sued appellant, alleging that appellant entered into a contract with them to deliver a car load of cattle at Kansas City, Mo., to their consignee the National Stock Commission; that, instead, appellant delivered the cattle to the same consignee at East St. Louis, Ill., that, by reason of this diversion from Kansas City to St. Louis, appellant failed to perform its contract, and thereby damaged appellees as follows: \$55 additional freight charge, \$300 difference in market price between Kansas

*See extensive note, 23 R. R. R. 191, 46 Am. & Eng. R. Cas., N. S., 191; second head-note of *White v. Minneapolis & R. R. Co.* (Minn.), 36 R. R. R. 747, 59 Am. & Eng. R. Cas., N. S., 747.

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City and St. Louis, and \$4 for feed. The appellant denied the allegations of the complaint as to the overcharge in freight. It admitted that the car of cattle was diverted in shipment from Kansas City to St. Louis for the following reason, to wit: "That when defendant's car reached Aurora, Mo., en route to Kansas City, it was ascertained that, on account of washouts and the floods along its line, it would be impossible for the defendant to get said car into Kansas City for several days; that plaintiffs, to avoid delay, allowed the defendant and agreed for the defendant to transfer said car of cattle to the Frisco Railroad for shipment to St. Louis." Appellant set up that the failure on its part to deliver the cattle according to contract to Kansas City was on account of an act of God, and that appellees were estopped from claiming any damages, if there were any, because after the washout on its road they consented to the transfer of the car of cattle from appellant's road to the Frisco. The appellant denies that there was any unreasonable delay, or that any damages accrued to appellees by reason of the diverted shipment. The conductor having in charge the train on which appellee's cattle were shipped testified as follows: "I remember having a car of cattle for Wood Bros., on that date. We took that car of cattle to Crane, Mo., 96 miles. When I arrived at Crickett, the red board was pulled on me to stop. When I stopped and went in I found two messages, one for me and one for Mr. Wood. The messages were the same. They read as follows: '10-30 a. m. Cotter, Ark. 7-11-09. Conductor 254, Crickett, Ark., advise man in charge of car cattle that all Kansas City lines are washed out, and ask him if he will consign cattle to St. Louis and we will deliver to Frisco at Aurora. If not will have to unload him at Crickett. J. W. D.' I handed it to him, and he asked me what it was, and I then read this message to him, and asked him what he wanted to do, and he said he would transfer to Aurora and go to St. Louis. I told him to give me a message to that effect then, and he asked me to write it for him and he signed it. I wrote the message at his request and he signed it." The message he sent reads: "J. W. D. I will take my cattle to St. Louis. W. M. Wood, Stockman." The roadmaster on the Joplin division of the Missouri Pacific testified that no trains passed over the track used by appellant's trains from Aurora to Kansas City for about one week on account of a washout. The Maridacene river washed out the railroad track between Joplin and Kansas City, Mo., so that appellees had to transfer to the Frisco for St. Louis. The telegram says, "All lines washed out." The waybill contained a statement showing that the cattle were shipped over Frisco to St. Louis on account of "high water in Kansas City." Witness said this was a mistake in copying the telegram by the agent. He should have written: "All lines washed out." One of the

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appellees testified that, "on account of this car being shipped to St. Louis instead of Kansas City," appellees "had to pay out \$55 for overcharges." This testimony was not controverted by appellant.

W. E. Hemingway, E. B. Kinsworthy, Horton & South, and Jas. H. Stevenson, for appellant.

WOOD, J. (after stating the facts as above). First. The appellees cannot recover for the following reasons: [1] (1) The undisputed evidence shows that appellant could not perform its contract to transport the cattle to Kansas City because of an act of God. The flood that washed away appellant's track was an act of God within the exception to the carrier's liability as an insurer of freight in his hands for transportation. *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *L. R. M. R. & T. Ry. v. Talbot*, 47 Ark. 97, 14 S. W. 471.

[2] (2) The undisputed evidence shows that appellees after being advised of the conditions that made it impossible for appellant to deliver the cattle to Kansas City under the contract assented to the change of route and the diversion of the shipment to the consignee at St. Louis, instead of Kansas City. Appellees are therefore estopped from claiming any damages that may have been occasioned by reason of such change in the shipment.

Second. The testimony shows that there was an overcharge in the freight that appellees had to pay of \$55. The appellant offered to confess judgment for the sum of \$62.84. The appellees should have judgment for that sum. The judgment will be modified and affirmed for that amount, and, as to the residue, will be reversed and dismissed.

ILLINOIS MATCH CO. *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois, June 20, 1911.)

[95 N. E. Rep. 492.]

Evidence—Conclusion of Witness.—A question, asked an officer of a corporation constantly shipping freight in car load lots for transportation beyond the line of the initial carrier, as to whether the corporation had ever agreed with the carrier that the corporation should be bound by the condition contained in the bill of lading limiting the liability of the carrier to damages on its own line, was objectionable as calling for a mere conclusion of the witness.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.—Where an officer of a corporation, constantly delivering goods in car load lots to a carrier for transportation beyond its line, testified that when he made up the shipping order for a particular shipment he did not know the conditions of the carrier's bill of lading, and that his attention had never been called to the conditions therein, and other officers testified to the same effect, the statement of the officer, in response to a question calling for his conclusion, that, speaking as a representative of the corporation, he had not, and as far as he knew no other officer of the corporation had, consented to conditions in the bill of lading, the error in overruling an objection to the question was not ground for reversal.

Contracts—Construction—Separate Statements.—Where two written instruments are executed to evidence one transaction, they will be read and considered as one instrument in arriving at the intention of the parties.

Carriers—Shipping Contracts—Instruments Constituting.*—Where a shipper delivered to a carrier his shipping order as per conditions of the carrier's bill of lading, and the carrier delivered to the shipper a bill of lading, the shipping order and the bill of lading constituted the contract of transportation; but the carrier, limiting its liability in the bill of lading, must show by evidence outside of the instruments that the limitations were assented to by the shipper.

Carriers—Contracts—Presumptions.†—The acceptance by a carrier of a car load of freight for delivery beyond its own line constitutes a

*For the authorities in this series on the question whether a common carrier may limit its liability and by what means it may do so, see first two foot-notes of *Mobile, etc., R. Co. v. Brownsville, etc., Stock Co.* (Tenn.), 37 R. R. R. 714, 60 Am. & Eng. R. Cas., N. S., 714; *Lansen v. Oregon S. L. R. Co.* (Utah), 37 R. R. R. 718, 60 Am. & Eng. R. Cas., N. S., 718; *Southern Express Co. v. Meyer Co.* (Ark.), 37 R. R. R. 13, 60 Am. & Eng. R. Cas., N. S., 13; *D'Arcy v. Adams Express Co.* (Mich.), 37 R. R. R. 462, 60 Am. & Eng. R. Cas., N. S., 462; second foot-note of *McIntosh v. Oregon R. & Nav. Co.* (Idaho), 33 R. R. R. 768, 56 Am. & Eng. R. Cas., N. S., 768.

†For the authorities in this series on the right of a common carrier to limit its liability to its own line, see foot-note of *Dodge v.*

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prima facie contract to carry and deliver to the point of destination with the liabilities of a carrier; but the carrier may limit its obligation to its own line, provided the restriction is assented to by the shipper.

Carriers—Contracts—Limitation of Liability—Validity.*—Under the statute prohibiting a carrier from limiting its common-law liability to safely deliver property, by any stipulation in the receipt given therefor, a limitation in a bill of lading acknowledging the receipt of property, which limits the liability of the carrier to loss on its own line, is invalid; but the common-law liability may be limited by the part of the bill constituting the contract on the shipper assenting to the restrictions; but the common-law liability may not be restricted merely by notice of limitations.

Carriers—"Bill of Lading."—A "bill of lading" is a written acknowledgment of the receipt of goods and an agreement, on consideration, to transport and deliver them at a specified place to a person named on his order.

Carriers—Contracts of Shipment—Presumptions.*—It is not presumed that a shipper intends to abandon any of his legal rights; but, where a limitation of a carrier's liability is knowingly assented to by him, it will bind him, whether he signs any agreement or not, and whether any restriction has been assented to is a matter of proof.

Carriers—Carriage of Freight—Limitation of Liability—Evidence—Instructions.—Where, in an action against the initial carrier for loss of freight on a connecting carrier's line, the evidence showed that plaintiff was constantly shipping freight in car load lots beyond the line of the initial carrier, and received bills of lading from the initial carrier limiting its liability for loss to that occurring on its own line, that plaintiff used shipping orders directing shipments as per conditions of the carrier's bill of lading, and the officers of plaintiff testified that they had never read a bill of lading and did not know its contents, the facts raised a natural inference that plaintiff, through its officers, knew the conditions of bills of lading and assented to the limitations therein, and the carrier was entitled to a charge that, if plaintiff assented to the conditions of the bill of lading, it could not recover.

Chicago, etc., Ry. Co. (Minn.), 37 R. R. R. 226, 60 Am. & Eng. R. Cas., N. S., 226; fourth head-note of *Pittsburg, etc., R. Co. v. Mitchell* (Ind.), 36 R. R. R. 760, 59 Am. & Eng. R. Cas., N. S., 760; second head-note of *McMeekin v. Southern Ry. Co.* (S. C.), 36 R. R. R. 129, 59 Am. & Eng. R. Cas., N. S., 129.

For the authorities in this series on the liability of a railroad, as carrier of freight, for loss or damage occurring on a connecting line in absence of a contract stipulation on the subject, see foot-note of *Carter v. Chicago, etc., R. Co.* (Iowa), 35 R. R. R. 362, 58 Am. & Eng. R. Cas., N. S., 362; last foot-note of *St. Louis, etc., R. Co. v. McGivney* (Okla.), 26 R. R. R. 702, 49 Am. & Eng. R. Cas., N. S., 702.

See () on preceding page.

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Appeal and Error—Harmless Error—Erroneous Instructions.—

Where instructions, which are mere abstract statements of law, and which do not apply the law to the case, are not misleading, the error in the instructions is not reversible.

Trial—Instructions—Inconsistent Instructions.—Where the instructions lay down contradictory rules, and following one rule will lead to a different result than will be arrived at by following the other rule, the instructions are defective and misleading.

Error to Appellate Court, Second District, on Appeal from Circuit Court, Will County; A. O. Marshall, Judge.

Action by the Illinois Match Company against the Chicago, Rock Island & Pacific Railway Company. There was a judgment of the Appellate Court (153 Ill. App. 568) affirming a judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. L. O'Donnel, T. F. Donovan, and J. A. Bray (Winston, Payne, Strawn & Shaw, of counsel), for plaintiff in error.

Knox & Akin, for defendant in error.

CARTWRIGHT, J. On June 16, 1904, the defendant in error, the Illinois Match Company, delivered to the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company, a car-load of matches consigned to John T. Huner, Our Darling Siding, Queen's county, N. Y. The plaintiff in error delivered the car at Chicago to the Lake Shore & Michigan Southern Railway Company, which forwarded the car to New York, and in the evening of June 21, 1904, the matches were destroyed by fire while the car was standing on a storage track of the New York Central & Hudson River Railroad Company in New York City. Defendant in error sued the plaintiff in error in the circuit court of Will county for the damages occasioned by the loss of the matches and recovered a judgment of \$1,404.71, which was affirmed by the Appellate Court for the Second District. 153 Ill. App. 568. The record has been brought to this court by virtue of a writ of certiorari granted for that purpose.

The only substantial defense interposed and the only one mentioned or insisted upon in the brief and argument in this court is that there was a special contract entered into by the parties which limited all liability of the defendant to loss occurring upon its own lines. If there was such contract, the defendant was not liable for the loss, and, if there was not, there was no defense to the suit.

The plaintiff was a manufacturer of matches at Joliet and shipped them to all parts of the United States. Its shipments by the defendant's railroad and another railroad at Joliet amounted to from 100 to 150 car loads a year, besides other shipments of less than car load lots. The plaintiff had sold and shipped

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matches to John T. Huner, and in June, 1904, he bought 25 car loads from it, which were shipped as fast as they were manufactured. The plaintiff caused to be printed and kept for its own use a blank shipping order, with places for the name of the railroad company to which the car was delivered at Joliet and the name and address of the consignee, and containing directions to deliver the car in good order without unnecessary delay, "as per conditions of company's bill of lading." After the car in question was loaded, one of these shipping orders, directed to the defendant and containing the name and address of the consignee, was delivered to the defendant. The defendant then made and delivered to the plaintiff a bill of lading, signed by its agent, acknowledging the receipt of the car load of matches, to be delivered to the next carrier to be carried to its destination, and both in that part of the bill of lading which constituted the receipt and the subsequent portion containing the agreement of the defendant there was a limitation of liability to the defendant's own lines. It contained an agreement that the defendant assumed no responsibility for the safe carriage of the matches, or for their safety, except on its own road. The secretary of the plaintiff testified that when he made out the shipping order he did not know what the conditions of the defendant's bill of lading were, that his attention had never been called to the conditions in its bills of lading and that he never read the bill of lading for this car. The treasurer and manager of the plaintiff, who received the bill of lading, testified that he read only the written portions, and had never read the other provisions and conditions, and did not know until the trial what they were, and that he never talked with the defendant or any of its agents as to whether the plaintiff would be bound by the conditions in the bill of lading. The president testified that prior to the trial he never read or examined the form of the bill of lading and never knew of the terms and conditions. There was another general officer of the plaintiff, but he had nothing to do with shipping goods.

[1, 2] The secretary was asked whether the plaintiff ever assented or agreed with the defendant that the plaintiff should be bound by the conditions contained in the bill of lading, and the court overruled an objection to the question. The ruling was wrong, as it called for a mere conclusion; but the answer of the witness was that, speaking as a representative of the company, he had never, and so far as he knew no other representative of the company had ever, so consented. While the answer was somewhat in the nature of a conclusion, it was a necessary one from the testimony of that witness and others and would not be bound for a reversal of the judgment.

[3] Where two written instruments are executed as the evidence of one transaction, they will be read and considered to-

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gether as one instrument in arriving at the intention of the parties. *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896; 1 Greenleaf on Evidence, § 283.

[4] Under that rule the shipping order delivered by the plaintiff to defendant and the bill of lading delivered by defendant to plaintiff constituted the contract between the parties for the carriage of the matches. 4 Elliott on Railroads, § 1424. That being so, it is contended that the plaintiff was estopped by the shipping order from asserting that it did not agree to the conditions of the bill of lading. That is true as to ordinary contracts (*Wynkoop v. Cowing*, 21 Ill. 570), and the general rule was applied to such contracts as this in *Black v. Wabash, St. Louis & Pacific Railway Co.*, 111 Ill. 351, 53 Am. Rep. 628. But that decision was overruled in *Wabash Railroad Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 104, where it was held that, even if the shipper signs the bill of lading containing limitations on the liability of the carrier, the burden is still on the carrier to show by evidence ~~alunde~~ that the restrictions or limitations of the common-law liability contained therein were assented to by the shipper. Of course, this does not mean that there must be a verbal contract in addition to the written one, but means that the evidence must show that the contract was understandingly entered into by the shipper and its limitations assented to. If this is the rule, it must apply where the contract consists of two instruments instead of only one, and the conclusion whether this contract was assented to by the plaintiff must depend upon other evidence than the writing.

[5] The acceptance by the defendant of the car load of matches marked to a place beyond the terminus of its line constituted a *prima facie* contract to carry and deliver at the place so marked, with all the liabilities and duties of a common carrier. *Erie Railway Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. The carrier may limit its obligation to carry goods safely to its own lines, although they are marked to a point beyond, and, if such restriction is assented to by the shipper, it will bind him. *Erie Railway Co. v. Wilcox*, *supra*.

[6] The statute provides that it shall not be lawful for a carrier to limit its common-law liability to safely deliver property received by it at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property. The limitation contained in that part of the bill of lading acknowledging the receipt of the property was therefore in violation of law and of no effect; but the common-law liability may be limited by that part of the bill of lading which constitutes a contract if the shipper assents to

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the restrictions. *Chicago & Northwestern Railway Co. v. Simon*, *supra*.

[7] A bill of lading is both a written acknowledgment of the receipt of goods and also an agreement for a consideration to transport and deliver the same at the specified place to a person therein named, or his order. It has the twofold character of a receipt and an agreement. 4 Elliott on Railroads, § 1415; 4 Am. & Eng. Ency. of Law (2d Ed.) 510. The common-law liability cannot be restricted merely by notice of any limitation, and the carrier is bound to receive and carry goods offered for transportation, subject to all the incidents of the employment, unless some exemption from liability is given by express contract.

[8] There is no presumption that the shipper intends to abandon any of his legal rights; but, if a limitation of liability is understandingly assented to by him, it will bind him whether he signs any agreement or not, and whether such restrictions have been assented to in a particular case is always a matter of evidence. *Western Transportation Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Merchants' Despatch Transportation Co. v. Theilbar*, 86 Ill. 71; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191.

[9] In this case the plaintiff was constantly shipping matches in car load lots, and otherwise, by rail from Joliet to points beyond the lines of the railroads, and received bills of lading from the defendant containing the conditions and restrictions of the one in question. It was using shipping orders directing shipments "as per conditions of company's bill of lading." Its officers testified that they never read a bill of lading and did not know its contents. The facts proved by the defendant would raise a natural inference that the plaintiff, through its officers or agents, knew the conditions of bills of lading and by the shipping order intended that the matches should be shipped on the conditions therein specified and thereby assented to the limitations therein contained. The defendant had a right to have the evidence in its favor submitted to the jury upon correct instructions as to the law. The court gave at the request of the plaintiff 13 instructions, and with one exception they were mere abstract statements of rules relating to the duties and liability of common carriers of goods received for transportation.

[10] Instructions should be so drawn as to apply to the case to be decided by the jury; but, if the instructions are not misleading, it is not ground for reversal that they are mere statements of rules of law. *Chicago City Railway Co. v. Anderson*, 193 Ill. 9, 61 N. E. 999. These instructions, however, were misleading, both because they ignored the real matter in controversy and were incorrect as applied to the case. Instruction 5 will show the general character of the instructions, and it is as follows:

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"The court instructs the jury that a common carrier is an insurer for the safe transportation and delivery of goods intrusted to it for carriage, and in case of loss or injury to such goods it can only relieve itself from liability as an insurer by showing that the loss or injury was occasioned either by an act of God or the public enemy, or by reason of some neglect or failure of the shipper, or that the loss or injury resulted from the inherent nature of the goods, which the exercise of ordinary care on its part would not have prevented."

If the jury accepted that instruction as the law, a verdict for the plaintiff was inevitable, and the defense was wholly eliminated. The jury, applying the instruction to this case, would necessarily say that the defendant could not relieve itself from liability as an insurer by showing that the loss of the matches was occasioned either by an act of God or the public enemy, or by reason of the neglect of the shipper, or that the loss resulted from the inherent nature of the goods, which the exercise of ordinary care on its part would not have prevented. Such instructions could only be justified if the defendant was not entitled to have its defense submitted to the jury at all, and could only be sustained in a case where the court ought to have directed a verdict.

[11] The court did tell the jury, as requested by the defendant, that if the plaintiff assented to the conditions of the bill of lading, it could not recover unless the loss occurred while the goods were in the defendant's possession or was caused by the negligence of the defendant or its servants, but that was merely contradicting the instruction above quoted; and if instructions lay down contradiction rules, and following one rule would lead to a different result than would be arrived at by following another, the instructions are defective and misleading. *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Best*, 169 Ill. 301, 43 N. E. 684.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

WASHINGTON SOUTHERN RY. CO. *v.* COMMONWEALTH *ex rel.*
STATE CORPORATION COMMISSION.

(Supreme Court of Appeals of Virginia, June 8, 1911.)

[71 S. E. Rep. 539.]

Commerce—Establishment of Rates—Objections.—Where a carrier, in the unrestrained course of business, adopted a lower schedule of charges for intrastate and interstate passenger service than the rate allowed by the State Corporation Commission for intrastate business, it cannot object to the rates fixed by the commission as substantially burdening interstate commerce.

Carriers—Reasonableness of Rates.—The rule that the reasonableness of railroad rates prescribed by state authority for passenger traffic wholly within its limits must ordinarily be determined by the intrastate business, and that the value of the property employed, cost of maintenance, operating expenses, and the like, must be considered in fixing fair rates, is applicable to railroads doing a substantial intrastate business, but not to a railroad built and operated essentially for interstate purposes, and where the intrastate business is merely incidental and too inconsiderable to make it feasible to fix a reasonable maximum rate on the basis of comparative values.

Carriers—Establishment of Rates—Decision of State Corporation Commission—Appeal—Presumptions.—Under Const. 1902, §§ 156d, 156f Code 1904, pp. ccliv, cclv), authorizing appeals from orders of the State Corporation Commission establishing rates which will be regarded as *prima facie* reasonable, the burden of showing the unreasonableness of rates fixed by the commission rests on the carrier, appealing from the order of the commission; and, unless it does so, the determination of the commission will be affirmed.

Keith, P., and Cardwell, J., dissenting.

Appeal from State Corporation Commission.

Proceedings on the relation of the State Corporation Commission for the establishment of a maximum intrastate passenger rate for the Washington Southern Railway Company. From an order of the commission, the railway company appeals. Affirmed.

Hill Carter, for appellant.

The Attorney General, for appellee.

WHITTLE, J. This appeal is from an order of the State Corporation Commission of June 23, 1910, establishing a maximum intrastate passenger rate for the Washington Southern Railway Company of 2½ cents, instead of 3 cents, per mile for each passenger.

The contention of the company in its petition to the commis-

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sion was that the former rate of 2 cents per mile was confiscatory.

The litigation between the State Corporation Commission and some of the more important railroads in the state touching the subject of intrastate passenger rates is a matter of public knowledge and germane to the present inquiry. Prior to April 27, 1907, no restriction by state authority had been placed upon the right of railroads to fix their own schedule of rates for carrying passengers, and the uniform rate established by them in Virginia was 3 cents per mile. At that date, the commission fixed the general maximum intrastate rate at 2 cents per mile. Whereupon, several of the principal railroads obtained injunctions from the judge of the Circuit Court of the United States for the Eastern District of Virginia, restraining the commission from the enforcement of the rate prescribed, upon the allegation that such rate was confiscatory. The state strenuously denied the jurisdiction of a federal judge to enjoin the action of the commission, insisting that these rate orders were the orders of a state court of competent jurisdiction, and that by express provision of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581) the United States courts are forbidden "to stay proceedings in any court of the state. * * *" On appeal, the Supreme Court of the United States (November 30, 1908), by divided court, reversed the decree of the Circuit Court. See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. The decision of the majority, however, was considered inconclusive and unsatisfactory by both parties to the litigation, and the suit in the Circuit Court of the United States was not further prosecuted. It seems that, before the opinion of the Supreme Court was announced, a compact had been entered into between the litigating railroad companies and counsel for the state that, whatever the result might be, a rehearing of the matter of rates on the merits would be allowed the railroads by the commission. The rehearing thus agreed upon was accordingly had, and the commission settled upon a general maximum intrastate passenger rate of 2½ cents per mile. Their action in that regard has been acquiesced in by all of the leading railroads in the state, and the injunction proceedings in the Circuit Court of the United States dismissed.

The Washington Southern Railway Company extends from Quantico (the northern terminus of the Richmond, Fredericksburg & Potomac Railroad), a distance of 36 miles, to the southern end of the bridge across the Potomac river at Washington. The company was originally formed by the consolidation of the Alexandria & Fredericksburg Railroad with the Washington Railroad. The old road has been practically relocated, rebuilt, and double-tracked. As one of the witnesses describes the situation, the present road bears the same relation to the old road as the

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two straight lines of the dollar mark to the letter "S." Hence the road practically carries double capitalization, and the expense of rebuilding it was materially increased by reason of the nature of the route selected for relocation and the high grade of construction. The road is located between the Potomac river, on one side, and a range of bluffs, on the other, and, beyond the immediate vicinity of the northern terminus, passes through an extremely sparsely settled territory. It was rebuilt almost exclusively for the accommodation of interstate traffic, which composes 95 per cent. of its entire business.

The road is controlled (through stock ownership) by the Baltimore & Ohio, the Chesapeake & Ohio, the Atlantic Coast Line, the Seaboard Air Line, the Southern, and the Richmond, Fredericksburg & Potomac Railroads, and forms the link between the Northern and Southern connections of these great systems. The intrastate traffic is a mere incident to the substantial business of the company, and is so inconsiderable and comparatively of such minor importance as to render the ordinary methods of distribution of burdens and benefits between the two classes of business impracticable.

In dealing with this aspect of the case, Prentis, Chairman (in an excellent opinion), observes: "It would not have been constructed and could not be maintained for intrastate business alone. Its strictly intrastate passenger business is only an incident to its general business and almost a negligible consideration."

It plainly appears, from data furnished by the appellant itself, that if the cost of construction, maintenance, and operation of the road were apportioned on the basis of the volume of interstate and intrastate business, respectively, and 5 per cent. of the joint business allotted to intrastate traffic, it would represent an utterly insufficient capital to build, upon the cheapest possible plan, or even to maintain, any sort of a railroad between the termini of the Washington Southern. Moreover, it was admitted by counsel in argument that a maximum rate of 5 cents per mile on intrastate travel alone would not yield a fair return on the capital invested upon any apportionment of values submitted to the commission. This admission of itself shows the impracticability, in the circumstances of this case, of making a reasonable return on the capital invested from intrastate traffic solely the basis for the establishment of a maximum passenger rate.

Since this case was submitted, our attention has been called to the decision of Judge Sanborn in the "Minnesota Rate Case," *Shepard v. Northern Pac. Ry. Co.* (U. S. Circuit Court) 184 Fed. 765, decided April 11, 1911. It is cited as authority for the proposition that it is beyond the competency of the state to establish a different and lesser maximum passenger rate for intrastate travel than the maximum rate allowed for interstate

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travel, where the effect of such action will necessarily amount to or operate as a regulation of or substantial burden upon interstate commerce. In that case it was the finding of the master (which the court confirmed) that the necessary effect of the reductions in rates in Minnesota below the basis of its lawful interstate rates deprived the company of its power to transact interstate business outside the state, and that the necessary operation and effect of the installation of the reduced rates was to materially burden interstate business and to regulate interstate commerce.

[1] No such results can be predicated of the action of the commission under the facts of this case. There is no contention on the part of the appellant that its earnings from its general operations, even at a lesser rate than the maximum rate fixed by the commission, are not ample to meet all lawful demands upon it and to make a fair return, on the capital invested and for services rendered to the public. Indeed, the record shows that in the unrestrained course of business the company adopted a lower schedule of charges, both for intrastate and interstate passenger service, than the rate allowed by the commission. This fact alone would seem to afford a conclusive answer to appellant's pretension.

In this connection we again quote from the opinion of Judge Prentiss: "The company has been perfectly free to fix its interstate rates, except so far as it may have been controlled by competition and trade conditions. Notwithstanding this freedom with reference to interstate business, it has been doing its entire passenger business at an average of 2.47 cents per mile, and its entire passenger business in Virginia, both state and interstate, at 2.35 cents per mile. As the total revenues from its strictly intrastate passenger traffic does not exceed 6 per cent. of its total passenger traffic, the enforcement of the 2-cent passenger rate for its strictly intrastate passenger business cannot very seriously affect these average rates per mile. Taking a general view of the situation, and taking notice of the fact that the standard rate upon the chief lines of railway in Virginia is a maximum of 2½ cents per mile, * * * we think the Washington Southern, as a part of a great railway line between the North and the South on the Atlantic coast, should be placed in the same class with the railways which have been named."

[2] We are not unmindful of the general rules enunciated by the Supreme Court of the United States in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. R. A. 819, and that line of decisions, namely, that the reasonableness or unreasonableness of rates prescribed by state authority for transportation of persons over a road wholly within its limits must ordinarily be determined by the intrastate business, and, besides, that the value of the property employed, the cost of maintenance, operating

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expenses, and the like, are proper constituents to be considered in fixing a rate which will pay a fair return to the company on its investment and for its services to the public. Under ordinary conditions these principles are eminently wise and just, and admit of practical application, and should be controlling. Take, for example, the Norfolk & Western, or the Southern (whose lines extend across the state), or, indeed, any other railroad company doing a substantial intrastate business. To such railways the foregoing rules are appropriate, and may well be applied. But they can in no sense be regarded as dominating factors where, as in this case, the road is built, maintained, and operated essentially for interstate purposes, and where the intrastate business is incidental merely and confessedly too inconsiderable to render feasible the fixing of a reasonable maximum passenger rate on the basis of comparative values.

[3] By article 12, § 156d, of the Constitution of Virginia of 1902 (Code 1904, p. ccliv), an appeal of right lies to this court from the order of the commission.

Section 156f (page cclv) prescribes that "the appellate court shall have jurisdiction to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct."

The same rule of decision has been established by the decisions of the Supreme Court of the United States. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consol. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

In conclusion, we are of opinion that the appellant has failed to sustain the burden cast upon it by the foregoing rule of decision, and that the order of the commission is just, reasonable, and correct, and ought to be affirmed.

Affirmed.

KEITH, P., and CARDWELL, J., dissenting.

MIDLAND VALLEY R. CO. v. EZELL.

(Supreme Court of Oklahoma, May 9, 1911.)

[116 Pac. Rep. 166.]

Carriers—Construction—Limitation—Validity.*—A contract between a railway company and the shipper of live stock for the transportation of live stock, providing that as a condition precedent to the shipper's right to recover for any damages or for any loss or injury to his stock during transportation thereof, that he will give definite written notice of his claim to some general officer or agent of the railway company as soon after the occurrence of the loss or damages as the circumstances will permit; and that if he should fail from any cause to give such notice within 91 days from the date of such loss or damages, no liability shall exist therefor under the contract, does not violate section 1128 of Comp. Laws of Okla. 1909.

Carriers—Injury to Live Stock—Petition—Sufficiency.—In an action upon such contract for loss and injury to live stock during transportation, a petition which fails to allege compliance with the conditions of the contract requiring notice of the claim of damages or waiver thereof is defective and insufficient to state a cause of action.

(Syllabus by the Court.)

Error from Osage County Court; C. E. Bennett, Judge.

Action by H. G. Ezell against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Edgar A. De Meules, for plaintiff in error.

T. J. Leahy, *E. F. Scott*, and *C. K. Templeton*, for defendant in error.

HAYES, J. This proceeding in error is brought to review a judgment of the county court of Osage county in an action wherein defendant in error seeks to recover damages in the sum of \$130 for alleged loss and injury to one car of hogs shipped by him from Easterly Station in the state of Texas to Foraker in this state. The shipment took place before the admission of the state into the Union. Defendant in error alleges in his petition in the lower court that for a valuable consideration plaintiff in error agreed to accept, carry, and transfer said car of hogs from the station in Texas to said point in Oklahoma. He further alleges that at the time of said agreement on the 24th day of August, 1906, a bill of lading was executed by the agent of the railway company and the car of hogs was

*See first foot-note of *Kime v. Southern Ry. Co.* (N. C.), 38 R. R. R. 704, 61 Am. & Eng. R. Cas., N. S., 704; last head-note of *Mobile, etc., R. Co. v. Brownsville, etc., Stock Co.* (Tenn.), 37 R. R. R. 714, 60 Am. & Eng. R. Cas., N. S., 714.

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delivered and accepted by defendant in error, which bill of lading is attached to his petition and by specific declarations in the petition is made part thereof. He alleges that the damages sustained by him consist of bills expended for feed for the hogs, loss of two hogs escaping from plaintiff in error's pens where the same were unloaded at one of its stations, and for injury received by the hogs resulting from a wreck of the train of which the car was a part, resulting in the death of one hog, crippling some, and injuries of general character to all the others. After answer, the cause was tried to a jury whose verdict was for defendant in error. Defendant in error introduced as part of his evidence in chief the contract attached to and made part of his petition, which is, in the main, the ordinary shipper's contract generally used and executed by railway companies and shippers for the shipment of live stock, and contains such covenants and conditions as are usually found in such contracts. The seventh covenant therein reads as follows: "That said second party further expressly agrees as a condition precedent to his right to recover for any damages or for any loss or injury to his said stock during transportation thereof, or previous to the loading thereof for shipment, that he will give definite written notice of his claim to some general officer or agent of the first party as soon after the occurrence of such loss, damage, or injury as the circumstances will permit, and that should he fail from any cause to give the party of the first part the said notice within ninety-one days from date of loss, damage or injury to said stock, his failure to do so shall be a complete bar to any recovery on any and all such claims."

There was a demurrer by plaintiff in error, both to defendant in error's petition and to his evidence. The grounds upon which the same were urged upon the attention of the trial court were that defendant in error failed to allege in his petition or to establish by evidence that the notice of claim for any damages required under the foregoing seventh covenant of the contract had been given or waived. Plaintiff in error contends, and defendant in error concedes, that these questions, as well as all other questions arising under the pleadings and evidence in this case, must be determined in accordance with the laws of the territory of Oklahoma as they existed at the time of the injury to the hogs; and we therefore are saved the necessity of determining by what statutes or laws the rights of the parties under the contract are governed.

[1] Defendant in error contends, first that the seventh covenant of the contract is void; and, second, that if it is not void this is an action *ex delicto*, and the provisions of the contract have no application to it. The validity of this character of stipulations in contracts for the shipment of live stock was first considered in this jurisdiction in *St. L. & S. F. Ry. Co. v*

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Phillips, 17 Okl. 264, 87 Pac. 470, wherein such stipulations are held, when reasonable, to be valid and not against the policy of the law. This case has been several times considered and followed by the present court: *M., K. & T. Ry. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 866; *St. L. & S. F. Ry. Co. v. Cake*, 25 Okl. 227, 105 Pac. 322. But in none of these cases was any reference made to section 1128 of Comp. Laws of Okl. 1909, which reads as follows: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the contrary tribunals, or which limits the time in which he may thus enforce his rights, is void."

Counsel for defendant in error call the court's attention to this statute, and insist that the contract here involved is in contravention thereof; but in this we think they are in error. The last clause of this statute prohibits contracts fixing the limit of time within which suits may be brought. This clearly has no application to the matters covered in the seventh stipulation of the contract here involved, for that covenant does not attempt to fix the time within which suit thereon, if any, shall be brought; nor is it here urged that this action cannot be prosecuted because not brought within any time fixed by the contract. The first clause of this statute, as was said by the court in *Hartwell v. Northern Pac. Exp. Co.*, 5 Dak. 463, 41 N. W. 732, 3 L. R. A. 342, states substantially the common-law doctrine as generally announced by the decisions of all the courts, that contract by which parties undertake to stipulate that they will not enforce any rights they may have under a contract by the usual legal proceedings are void. The contract in this case does not attempt to restrict either of the parties as to the character of proceeding in which he shall enforce his rights thereunder. It does not impose a limitation upon the time proceedings shall be taken to enforce the rights of either party; but its terms do provide that there shall be no right for damages under the contract arising from certain causes named therein, unless the notice stipulated for shall be given. The stipulation creates a condition precedent to the existence of the right, rather than a limitation upon the enforcement of that right, and does not, we think, fall within the statute.

[2] Recurring to defendant in error's contention that this is an action *ex delicto* rather than an action *ex contractu*, it may be said that, under the various Codes of Practice adopted in the several states, the courts often find difficulty in ascertaining whether plaintiff has elected in this character of case to sue upon a breach of duty imposed by the common law or upon the contract. There are no fixed and certain rules which may be applied to all cases to determine this question. Generally, it must be determined in each case by the allegations of plain-

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tiff's petition, taken as a whole. In 3 Hutchinson, Carriers, p. 1579, however, one general rule is stated in the following language: "As at common law, the mere mention of the word 'undertake,' 'promise,' or the like, would not be sufficient to indicate an intention to rely upon the contract. These words, as we have seen, do not necessarily refer to or imply, in pleading, a contract. If, however, the contract should be distinctly set out, and its description should be accompanied by its profert or exhibit, as is required by many, perhaps by all, of such Codes, when the contract is sued upon, it would be conclusive that the party had elected to rely upon it instead of upon the failure in the performance of the legal duty."

Plaintiff in the instant case alleges in his amended petition an agreement between him and plaintiff in error; alleges that a consideration was agreed to be paid by him; the delivery by him and acceptance thereof by the carrier of the live stock involved; the execution of such agreement in writing; the delivery of the agreement executed by the railway company, and acceptance of same by him. As required by the Code, when any written instrument is to be made the basis of an action, he attached the contract to his petition, and, by specific declaration in his petition, makes it part thereof. If, under the foregoing facts there could be any doubt, tested by the general rule stated above, that defendant in error intended to base his action upon a contract between him and the carrier to transport safely the hogs, that doubt would be removed by the manner in which defendant in error has treated his own petition in the trial of the cause. He introduced the contract in evidence, and his testimony and the court's order relative to the admission thereof, are as follows: "Q. Did you receive at that time a live stock contract for the shipment? A. Yes, sir. Q. Was there any particular routing made at that time between you and the person accepting the shipment over what roads they should be shipped? A. I. & G. N., M., K. & T., and Midland Valley. Q. I will now hand you a paper and ask you to state whether or not this is the live stock contract made at the time you loaded the hogs at the original place of loading in Texas? A. Yes, sir; that's the one. Q. Examine that instrument and state whether or not that is your signature. A. Yes, sir; it is. Q. And that is the contract that you received at the time you loaded these cars? A. Yes, sir. [Be it remembered: That here the plaintiff offered in evidence the bill of lading or contract attached to the amended petition, referred to therein as 'Exhibit A' and made a part of said amended petition, and above identified by the plaintiff H. G. Ezell, which said offer was accepted, and the said bill of lading or contract was by the court admitted in evidence and marked 'Exhibit A.'] Q. I will ask you to examine the indorsement on the bill of lading and ask you what

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it is? A. I. & G. N., Mineola; M., K. & T., Nelagony; Midland Valley. Q. Do you know who placed that on there? A. No; I do not. Q. But it was on the contract at the time you received it? A. I suppose the agent put it on there; I give him the routing. Q. Do you know the routing transported this shipment of hogs to the station at Nelagony? A. That's what the agent told me. Q. And from what you observed on the train en route? A. Yes, sir."

Plaintiff in error was not the initial carrier with whom the contract was executed; and from the foregoing evidence and other evidence disclosed by the record, it is clearly apparent that defendant in error was trying to fix the liability upon plaintiff in error, on whose line the injuries occurred, because it had accepted the shipment of hogs under said contract from the connecting carrier. Defendant in error might have waived the contract and elected to bring his action upon the basis of plaintiff in error's common-law liability, without referring to the contract or setting out the same in his petition. If he had done so, then in order for plaintiff in error to have availed itself of the special conditions in the contract limiting its liability, it would have been necessary for it to have pleaded the contract in its answer; but, when plaintiff based his action upon the contract which contains the stipulation that as a condition precedent to his right to recover any damages for loss or injury occurring to the live stock during transportation, written notice within 91 days from the date of loss shall be given to the carrier, it was necessary for him to show in his petition that the condition had been performed; and, in the absence of such averment, his petition does not state facts sufficient to constitute a cause of action. *Louisville, New Albany & Chicago Ry. Co. v. Widman*, 10 Ind. App. 92, 37 N. E. 554; *United States Express Co. v. Harris*, 51 Ind. 127; *Kalina v. Union Pac. Ry. Co.*, 69 Kan. 172, 76 Pac. 438. Nor did plaintiff make any effort to show by his evidence that such condition had been complied with. The demurrers to the petition and the evidence should have been sustained.

There are other assignments of error; but, since in all probability the questions already considered will dispose of the case, and the matters complained of in the other assignments will not likely occur in any subsequent trial of the case, we forego a consideration of them.

The judgment of the trial court is reversed and the cause remanded.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

RICK v. WELLS FARGO CO.

(Supreme Court of Utah, May 5, 1911.)

[115 Pac. Rep. 991.]

Carriers—Live Fish—Care—Duty of Carrier.—In a suit against an express company for death of young trout in transit, it was error to assume as a matter of law that the fish were afflicted with such latent infirmity as to require the shipper to notify the company what to do in caring for them in transit; the necessity for such notice being properly found upon evidence as a question of fact.

Carriers—Actions—Negative Findings—Want of Evidence.—The rule that a negative finding may be made where there is no evidence to sustain an affirmative issue applies where the burden of proof is upon the party against whom the finding is made, but did not apply to a question whether a carrier of live fish negligently cared for them; the burden to show care being on it.

Carriers—Live Fish—Care in Transportation—Burden of Proof.*—The burden was on an express company sued for death of young trout to show why it did not deliver the shipment in as good condition as that in which it was received, in the absence of a special contract limiting the company's duty.

Carriers—Live Fish—Care in Transit.†—That an express company's employee used due care and diligence according to his best knowledge does not excuse liability for death of part of the fish; the company's duty being fixed by law, and not measurable by the employee's knowledge.

Carriers—Live Fish—Care in Transit.—A finding that an express company was not negligent in "transporting" live fish does not show that care was used in handling the shipment.

Appeal from District Court, Third District; T. D. Lewis, Judge.

*See extensive note 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298; foot-note of *Armstrong, Byrd & Co. v. Illinois Cent. R. Co.* (Okla.), 37 R. R. R. 208, 60 Am. & Eng. R. Cas., N. S., 208; last foot-note of *Santa Fe, etc., R. Co. v. Grant Bros. Const. Co.* (Ariz.), 36 R. R. R. 420, 59 Am. & Eng. R. Cas., N. S., 420; first foot-note of *Bartlett v. Oregon R., etc., Co.* (Wash.), 35 R. R. R. 400, 58 Am. & Eng. R. Cas., N. S., 400.

†See last foot-note of *Trakas v. Charleston, etc., Ry. Co.* (S. C.), 38 R. R. R. 711, 61 Am. & Eng. R. Cas., N. S., 711; first two head-notes of *Atlantic C. L. R. Co. v. Rice* (Ala.), 37 R. R. R. 478, 60 Am. & Eng. R. Cas., N. S., 478; foot-note of *Wahle v. Great Northern Ry. Co.* (Mont.), 37 R. R. R. 467, 60 Am. & Eng. R. Cas., N. S., 467; *Colsch v. Chicago, etc., Ry. Co.* (Iowa), 37 R. R. R. 453, 60 Am. & Eng. R. Cas., N. S., 453; second head-note of *White v. Minneapolis & R. R. Co.* (Minn.), 36 R. R. R. 747, 59 Am. & Eng. R. Cas., N. S., 747; first head-note of *Chesapeake & O. Ry. Co. v. Hall* (Ky.), 34 R. R. R. 468, 57 Am. & Eng. R. Cas., N. S., 468; last head-note of *Jones v. Atlantic C. L. R. Co.* (N. C.), 31 R. R. R. 68, 54 Am. & Eng. R. Cas., N. S., 68.

Rick v. Wells Fargo Co

Action by P. M. Rick against the Wells Fargo Company. Judgment for defendant, and plaintiff appeals. Reversed for new trial.

Geo. B. Hancock, for appellant.

Allen T. Sanford, for appellee.

FRICK, C. J. Appellant brought this action against the respondent, as a common carrier, to recover damages which were caused by the death of 19,500 "young trout fish" through the alleged negligence of respondent while being transported by it from Salt Lake City to Elsinore, Utah. In the complaint appellant, in substance, alleged that respondent was engaged in the business of a common carrier; that in April, 1908, at Salt Lake City, Utah, it received for transportation from one C. Vadner for plaintiff about 20,000 "young trout fish" in good condition, to be transported by respondent by express from said Salt Lake City to the plaintiff at Elsinore, Utah; "that owing to the negligence of the defendant (respondent) and its agent and the unskillful and careless manner in which said defendant handled said fish during their transportation, and owing to the failure and neglect of defendant and its agent to sufficiently agitate the water in which said fish were contained, 19,500 of said fish died in transportation and while in the care and custody of the defendant." Appellant also alleged demand and refusal to pay the amount claimed by him, and that the value of the fish was \$97.50, and that the express charges which had been paid by appellant amounted to \$10.50. Upon the foregoing allegations he prayed judgment for \$108. The respondent filed an answer in which it admitted that it was engaged in the business alleged in the complaint; admitted that 20,000 young trout were shipped by Vadner to appellant at Elsinore, Utah; admitted the demand and refusal to pay the alleged claim for damages; admitted that appellant paid \$10.50 as express charges, and that approximately 19,500 "of said fish died in transportation." For further answer respondent denied the value of the fish to be as alleged, and further denied "each and every other allegation of the complaint." Upon the issues thus joined the case was tried and submitted to the court without a jury. The court found the material facts substantially as follows: That about the 8th day of March, 1908, appellant purchased from one C. S. Vadner, at Salt Lake City, Utah, 20,000 young trout fish. That said fish were by said Vadner at Salt Lake City, Utah, at said time, delivered to respondent for shipment, and were by it received in good condition to be transported from said Salt Lake City to Elsinore, Utah. "That in order to safely transport young trout, such as were shipped by the plaintiff, it is necessary that they have special care and attention, in that the water shall be frequently aerated by lifting up the water in a cup and pouring it into the vessel containing the fish. That

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the plaintiff or his agents in shipping said fish gave the defendant no notice or instructions that any special care or attention was required, and the defendant's employee or agent in handling said fish used due care and diligence according to his best knowledge and information in handling fish. That in the transportation of said fish, owing to the fact that the water was not sufficiently aerated, 19,500 of said fish died, of the value of \$97.50." As a conclusion of law the court found that respondent was "not guilty of any negligence in the transportation of said fish." Judgment therefore was rendered in favor of respondent, from which this appeal is prosecuted.

The first error assigned by appellant is that the court erred in finding the facts we have italicized for the reasons that they were outside of the issues presented by the pleadings, and wholly unsupported by any evidence. If the facts objected to are material and the contentions of appellant as we have set them forth are correct, then we think the court erred in making the findings, and that such error is prejudicial. First, then, were the facts which are objected to material to the just and proper disposition of the case? This depends upon the law applicable to a state of facts such as is disclosed by the pleadings. From the findings which are assailed, it is clear that the trial court proceeded upon the theory that the young trout belonged to that class of freight which was afflicted with some inherent latent weakness, infirmity, or vice which the owner or shipper was required to make known to the carrier, so that the carrier might guard against the consequences arising therefrom either by refusing to receive and transport the freight in the condition it was presented for transportation, or until he had time, if such was necessary, to make preparation to handle the same safely. The court must have concluded that the failure to impart notice of the infirmities aforesaid to respondent amounted to a concealment or fraud upon it which prevents the appellant from recovering in case the fish were injured or destroyed while in transport by some of the infirmities aforesaid and without special negligence upon the part of respondent in transporting them. The law in this respect is admirably stated by the author of Hutchinson on Carriers in Volume 1, §§ 341, 342, 343, as follows:

"Sec. 341. The carrier of living animals as freight is, however, by the great weight of authority to be regarded as a common carrier as to such freight, and not as a special agent of the owner for their transportation as has been sometimes contended. But, as the law has introduced by implication into every contract for the carriage of goods an exception to the carrier's liability in case where the loss to them, whilst in his charge, has been occasioned by the act of God or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself, so it has from the necessity and

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justice of the case introduced an exception in favor of the carrier of live stock, of accountability for its loss or injury resulting from its own uncontrollable vicious propensities, and the damages incident to its carriage from its inherent natural character. And this question as to the relation in which the carrier stands to such freight is of more importance than might at first be imagined, as, if he is to be treated in its transaction as a common carrier, he becomes an insurer, as in the case of other goods, against loss from every cause except the acts of God or of the public enemy or of the animals themselves, unless he has further protected himself by his contract, and, in case of loss or of injury to the freight, the burden of proving that it arose from its own fault rests upon him if he would excuse himself upon that ground.

"Sec. 342. But while it is always competent for the carrier to show in his defense that the injury resulted from the peculiar nature or inherent vices of the animals themselves, and thus excuse himself from liability if it appear that he has been guilty of any negligence and that such negligence contributed to the injury, the excuse can no longer avail him. It is his duty to exercise at all times ordinary care in guarding the stock against such injuries as are likely to result from their natural propensities, and which, in view of the character of the animals, can reasonably be foreseen and provided against; and for a failure to do so whereby the animals caused themselves injury he will be liable.

"Sec. 343. It is clearly the duty of the shipper to disclose, if requested, any peculiarities or infirmities of the animals, known to him and not to the carrier, which would increase the risk of carriage in the usual manner or require greater precautions for their safety than those usually requisite; and so, without request, it would be the duty of the shipper to disclose such peculiarities or infirmities not known to the carrier and not discernible from the appearance or condition of the animals, and the carrier would not be liable, in the absence of such a disclosure, where, having used the care and diligence usually requisite, and injury was sustained proximately owing to such peculiarity or infirmity. But a failure so to disclose would not relieve the carrier for a loss proximately caused by his own negligence, nor could he complain of the failure to disclose a condition of things evident from the appearance of the animal itself."

In *Beard v. Ill. Cent. Ry. Co.*, 79 Iowa, 520, 44 N. W. 801, 7 L. R. A. 280, 18 L. R. A. 381, the Supreme Court of Iowa, speaking through Mr. Justice Beck, states the rule thus: "A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury

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resulting from conditions which in the exercise of due care may be averted or counteracted. He must guard the goods from destruction or injury by the elements, from the effects of delays, indeed from every source of injury, which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment." The same doctrine is announced in *Carpenter v. B. & O. Ry.*, 6 Pennewill (Del.) 15, 64 Atl. 253, *Maslin v. B. & O. Ry.*, 14 W. Va. 189, 35 Am. Rep. 748, and in 4 Elliott on Railroads, § 1546. Numerous cases are cited in the foregoing cases and by Elliott, to which it is not necessary to refer.

[1] Assuming, therefore, that the theory outlined in the court's findings is supported by the great weight of authority, yet we cannot see upon what issue or evidence the court based the finding which is assailed by appellant's counsel. The court must have assumed as a matter of law that the court required special care and attention while in transit between Salt Lake City and Elsinore, Utah, a distance of approximately 175 miles, and, further, that the respondent neither knew nor had the means of knowing that the trout required such special care and attention. The court further assumed without proof, so far as the record discloses, that the shipper failed to impart notice to the carrier that the trout required special care and attention and also failed to impart notice to it of what such care and attention consisted. That the court apparently treated these matters as questions of fact is clear enough, or he would not have made the findings complained of. In view, however, of the pleadings and the evidence, there is much force to appellant's contention that he had no opportunity to meet such an issue by presenting any evidence upon the question, and hence has never had his day in court upon that subject. Can it be assumed as a matter of law that young trout are afflicted with such a latent infirmity that the carrier who accepts them for transportation in good condition by express, which every one knows is the speediest and perhaps safest method of transporting live property, like young fish, must be expressly told what he must do in taking

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care of them while in transit? May it not be a fact that the transportation of young trout has become of such frequent occurrence that express companies are or should be prepared to transport them safely without express directions from the shipper? At all events, must not the foregoing questions as well as whether the shipper or the carrier was negligent, and, if so, which one's negligence was the proximate cause of the loss be established by evidence as a matter of fact and not assumed as a matter of law? In *Chicago, B. & Q. Ry. v. Owen*, 21 Ill. App. 339, the court had under consideration a similar question with regard to the transportation of a valuable calf which while in transit had to be handled by the train and station men. The calf, by reason of its unruly disposition, required the handling, and by reason of it became overheated and died. The court, in speaking of whether the trainmen in handling the calf were negligent or not, at page 343 said: "Whether a given act is negligent or improper is to be determined by the surrounding circumstances and conditions existing at the time and which were or ought to have been known to the party sought to be charged." So may it also be said of anything omitted as well as of any act of commission. It may be that the duties of the carrier with respect to the care to be given to hogs, cattle, sheep, and horses while in transit have in certain district of this country become so generally known that, in case the facts are not in dispute, a court may say as a matter of law, whether the carrier was negligent or not with regard to given conduct. From the record before us, however, it would seem that the care which young trout require while in transit is rather a matter that must be left to those who are familiar with the nature and requirements of the fish, and whether the carrier or the shipper was negligent or not must be determined from the evidence and surrounding circumstances. The court, therefore, made a finding upon a subject upon which the parties have not been heard and upon which there was no competent evidence.

[2] Nor can it, under the circumstances, be said that the finding in question was proper because it was merely a negative finding, and that such a finding may be made in any case where there is no evidence in support of an affirmative issue. No doubt, when the burden of proof is upon the party against whom the negative finding is made, the foregoing rule is applicable. *Tate v. Rose*, 35 Utah, 229, 99 Pac. 1003. In the case at bar, however, the burden of proof with respect to whether the respondent as a common carrier took proper care of the trout while in transit was upon it.

[3] The respondent admitted that it received the trout for transportation, and that about 19,500 of them died while in transit, and the court found that they were in good condition when respondent received them. In view, therefore, of the duty that the law imposes upon common carriers, the burden of

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proof was upon the respondent to show why it did not deliver the trout in as good condition as they were when they were received by it. The rule with respect to the burden of proof in cases where live animals are transported by a common carrier and are injured while in transit is well stated by Mr. Justice Vanderburgh in the case of *Boehl v. Chicago, M. & St. P. Ry.*, 44 Minn. at page 192, 46 N. W. 334, in the following language: "And it is enough to make a prima facie case against him (the carrier) that the owner allege and show the delivery of the property to the carrier and the nature of the loss or damage suffered during its transit. It will then devolve on the carrier to show that such injury was caused without his fault an through the inherent nature or propensity or 'proper vice' as it is sometimes called of the animals transported." This rule applies where it is claimed that the animals were injured through the negligence of the common carrier as well as in other cases, unless the action is based upon a special contract which limits the duties of the carrier in that regard. This rule is illustrated and applied in the case just referred to.

[4] We are of the opinion, therefore, that the finding objected to was upon a material element in the case, that it is not supported by the evidence nor the pleadings, and that it does not fall within the class of negative findings which may be based upon the absence of evidence for the reason we have given. The court therefore erred in making said finding, and the error was prejudicial to appellant's rights. Neither can we see how the finding that respondent's "agent in handling said fish used due care and diligence according to his best knowledge and information in handling fish" can aid respondent. It may be that an employee of a common carrier may have used due care "according to his best knowledge and information," and yet the care he used may have fallen far short of that care which the carrier was bound to exercise in discharging his duty to the shipper. The employee's knowledge upon the subject may have been greatly lacking, or his information may have been wrong. The carrier can, however, not shield himself in that way. He must at his peril apply that degree of care in transporting property of all kinds which the law imposes, and can excuse himself only in the manner and under the conditions pointed out by the authorities we have quoted from.

[5] Nor does the fact that the court in its conclusions found "that the defendant was not negligent in the transportation of such fish" change the result. Such a conclusion, under the issues, could only have reference to the means used by respondent in transporting the fish and not to their care while in transit. But, entirely apart from what we have already said with respect to the burden of proof, we think that such burden in this case, in view of the unqualified admissions in the answer, was upon

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respondent to show that the fish died from some inherent vice or infirmity, the consequences of which could not, by the exercise of reasonable care, have been obviated. In other words, the burden was upon respondent to show that it was free from fault in taking care of the fish as well as being so in other respects. Further, we think the court should make special findings upon the questions (or, if the case be tried to a jury, that they be required to find, under proper instructions) whether the respondent was entitled to special notice with respect to what care the trout required while in transit, or whether such notice was given or not, or whether respondent, in view of the business it was engaged in, ought to have had knowledge of the special care that young trout require in transit, and whether the trout died from some latent inherent infirmity or vice.

For the foregoing reasons, the judgment is reversed, the cause remanded to the district court, with directions to grant a new trial, and to permit the parties to amend their pleadings if they are so advised, and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

MCCARTY and STRAUP, JJ., concur.

NATIONAL BANK OF WEBB CITY, MO., v. J. H. EVERETT & SON.

(Supreme Court of Georgia, June 13, 1911.)

[71 S. E. Rep. 660.]

Carriers—Transfer of Bill of Lading—Rights of Transferee.*—

Where a customer of a milling company orders flour, which is consigned by the milling company to itself, with a memorandum on the bill of lading to notify the customer, and contemporaneously the milling company draws a draft for the price of the flour on the customer, payable to a bank, to which is attached the bill of lading indorsed in blank, and deposits with the bank the draft with bill of lading attached, and the amount of the deposit is credited to the depositor's general account and drawn against by him, the bank becomes the purchaser and owner of the draft and bill of lading; and the title of the bank to the flour is superior to a subsequent lien against the milling company.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. H. Everett & Son against the Boyd & Gunning Milling Company. On levy of attachment, the National Bank

*See first foot-note of *McMeekin v. Southern Ry. Co.* (S. C.), 32 R. R. R. 441, 55 Am. & Eng. R. Cas., N. S., 441.

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of Webb City, Mo., filed a statutory claim. Verdict against claimant. From an order denying a new trial, it brings error. Reversed.

Brown & Randolph and *Hugh M. Scott*, for plaintiff in error.
C. D. Maddox, for defendant in error.

EVANS, P. J. J. H. Everett & Son sued out an attachment against the Boyd & Gunning Milling Company, and caused the same to be levied on a certain lot of flour contained in a railway car. The National Bank of Webb City, Mo., filed its statutory claim. The verdict of the jury was adverse to the claimant, and its motion for a new trial was overruled.

The flour upon which the attachment was levied was consigned by the milling company to itself, with direction in the bill of lading to notify the plaintiffs. The bill of lading was indorsed by the milling company and attached to a draft, drawn by the milling company for the purchase price of the flour, on the plaintiffs in favor of the claimant. The draft with bill of lading attached was deposited by the milling company with the bank, and the amount thereof placed to its credit. The draft with bill of lading attached was duly presented to the plaintiffs, who refused to pay it. At the time of the deposit of the draft the milling company had overdrawn its account with the bank. The milling company deposited other items that day, and drew several checks against the same. The milling company has not reimbursed the bank for the dishonored draft. The bank has not charged or received interest on the amount represented by the dishonored draft.

The foregoing is a fair résumé of all the testimony bearing on the bank's acquisition of the bill of lading. We do not think this testimony sufficient to justify the contention of the plaintiffs that the bank had no title to the flour, but was simply acting as the agent of the milling company in the collection of the draft drawn by it on the plaintiffs. Prima facie the passing to the credit of a depositor of a check drawn in favor of the bank, not indicating that it was deposited merely for collection, passes the title to the bank. 2 Morse on Banking, § 569 et seq. This general rule will yield to the intention of the parties as reflected in the transaction. If a regular customer of a bank deposits with the bank his draft, payable to his own order or to the bank, and the same is entered to his credit on the books of the bank, and the drawer by course of dealing has the right to draw against such deposit, and in fact did draw against it, and his checks are honored, the title to the draft passes to the bank. Fourth Natl. Bank v. Mayer, 89 Ga. 108, 14 S. E. 891. The bank may indicate its intention not to receive the draft as money, by receiving the draft deposited, not as cash, but as a check for collection. Bailie v. Augusta Savings Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

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In the instant case the evidence discloses that at the time of the deposit the drawer had overdrawn his account, and the deposit was entered as cash to his credit; that the drawer was not only accustomed to draw against deposits of this character, but actually did draw. These circumstances evince the parties' intention to treat the draft as a deposit of money, and therefore the title to the draft and the bill of lading attached is in the bank. The effect of the indorsement of the bill of lading and its delivery to the bank was a pledge of the flour to the bank. Delivery of the property is ordinarily essential to the validity of this species of bailment, but bills of lading or other commercial paper symbolic of property may be delivered in pledge and constitute constructive delivery of the physical property. Civil Code 1910, § 3528; *Farmers' Bank v. Allen-Holmes Co.*, 122 Ga. 67, 49 S. E. 816; *Central Georgia Land & Lumber Co. v. Exchange Bank*, 101 Ga. 353, 28 S. E. 863. It follows that the title to the flour under the undisputed facts was in the bank. *American Nat. Bank v. Lee*, 124 Ga. 863, 53 S. E. 268; *Farmers' Bank v. Allen-Holmes Co.*, *supra*; *Tilden v. Minor*, 45 Vt. 196; *German Nat. Bank v. Grimstead* (Ky.) 52 S. W. 951.

Judgment reversed. All the Justices concur.

KNOWLTON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Minnesota, June 23, 1911.)

[131 N. W. Rep. 858.]

Carriers—Live Stock Shipment—Action for Damages.—In an action for damages caused by defendant's negligence, the plaintiff must show the extent of injury and resulting damage attributable to the defendant's negligent acts. If the evidence shows only that three concurring causes produced an aggregate loss, and it appears that the defendant was not responsible for one cause producing a substantial part of the loss, the jury cannot arbitrarily apportion a part of the proven damages to the causes for which the defendant is responsible.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; W. C. Leary, Judge.

Action by C. E. Knowlton against the Chicago & Northwestern Railway Company. Verdict for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Brown, Abbott & Somsen, for appellant.

Stiles & Devaney, for respondent.

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SIMPSON, J. The plaintiff brought this action to recover for claimed injury to five car loads of cattle, caused by the failure of the defendant company to properly transport them over its lines from Wessington, S. D., to Chicago. The plaintiff claimed the defendant in three particulars failed to discharge its duty as a carrier: (1) In keeping the cattle an unreasonable time in transit; (2) in keeping the cattle on the cars, without unloading for feed, water, and rest, 2 or 3 hours more than the maximum allowed time of 36 hours; and (3) in rough handling the cars in which the cattle were being transported.

On the trial evidence was introduced tending to sustain the plaintiff's claim that the defendant had failed in its duty in each of the three particulars alleged. The cattle were in transit between 62 and 64 hours, having been unloaded, fed, and rested at Tracy. Stock trains made the trip often in 36 hours or less. Plaintiff's testimony showed that this excess time would add greatly to the shrinkage in weight and deterioration in condition of the cattle at the time of their arrival in Chicago. The cattle arrived in Chicago at 8 a. m. Friday, after a continuous run from Tracy. Plaintiff testified that the cattle were loaded at Tracy at 5:30 p. m., about half an hour before the train pulled out of Tracy. The train in fact left Tracy at 8 p. m. It appears from this evidence that the cattle were on cars from one-half to 2½ hours more than the maximum time allowed by the federal statute, without legal excuse. The carrier is liable to the owner of cattle for damages resulting from a violation of this statute.

The plaintiff testified that between Tracy and Chicago the train was "pounding along in slow condition;" that at Clinton the train was bumped so that in two cars several head of cattle were down and had to be prodded up. As a result of the excessive time taken in transporting the cattle and the rough handling of the train, plaintiff testified that the cattle, when they arrived in Chicago, were in a "gaunted condition, sore feet, lay down in the yard, and would not go and drink their water or eat their feed," and a "part of them" had sustained bruises.

The jury returned a verdict in plaintiff's favor for \$350, and answered a question submitted as follows: "Q. Where the cattle in question transported from Wessington, S. D., to the Chicago Stockyards within a reasonable time under all the circumstances in this case? A. Yes."

No testimony was given of the extent to which the stock were bruised or any extent of damage caused thereby, or the extent of depreciation in weight and condition attributable to rough handling or keeping on the cars beyond the 36-hour limit. The finding of the jury that by the defendant's fault in these two particulars the cattle were depreciated to the extent of \$350 was necessarily a guess. An examination of the evidence

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clearly shows that the chief injury to the cattle was occasioned by their being in transit an excessive time. The jury found that this was not due to any fault or negligence of the defendant. Having so found, the jury could not do that which the evidence had not done—~~separate the injury~~ occasioned by such delay in transit from the injury attributable to the two other causes. For this reason there must be a new trial, and the motion of defendant for a new trial should have been granted.

Reversed.

VIRGINIA-CAROLINA PEANUT CO. v. ATLANTIC COAST LINE R. R.

(Supreme Court of North Carolina, May 3, 1911.)

[71 S. E. Rep. 71.]

Carriers—Principal and Agent—Negligent Delay in Transportation of Freight—Special Damages—Liability.*—Where a carrier contracted with an agent of an undisclosed principal for the transportation of machinery, without being informed of any special circumstance requiring prompt delivery, but was subsequently notified thereof, and negligently delayed the transportation, it was liable for special damages so arising after it had a reasonable opportunity to avoid further delay after such notice, and the undisclosed principal suing for the negligent delay could prove the special circumstances of which the carrier received notice.

Appeal from Superior Court, Martin County; Peebles, Judge.

Action by the Virginia-Carolina Peanut Company against the Atlantic Coast Line Railroad. From a judgment awarding nominal damages, plaintiff appeals. Reversed and remanded.

The action was to recover damages for negligent delay on the part of defendant company in conveying a lot of machinery shipped over defendant's road. On the trial it appeared: That plaintiff was a corporation, doing a general business in manufacturing and cleaning of peanuts, at Williamston, N. C., and that in the latter part of August, 1907, Eli Gurganus, acting for said company, but without having informed the company of this fact, so far as the evidence shows, ordered from the Apomattox Iron Works at Petersburg, Va., a car load of machinery for equipment of plaintiff's mill at Williamston, N. C., and had same shipped over defendant's road, taking a bill of lading therefor in his own name. That the machinery, consisting of peanut shellers, drums, shakers, and shafting, etc.,

*See first foot-note of Chicago, etc., Ry. Co. v. Miles (Ark.), 35 R. R. R. 134, 58 Am. & Eng. R. Cas., N. S., 134.

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and described, in detail, in the testimony, was mostly of a heavy order, weighing something like 8,000 pounds, and was shipped in an open car. That the distance between the two points by rail was about 140 miles, the time about two or three days, and there was negligent delay in the carriage, the machinery having been shipped August 29th, and not arriving at Williamston until September 16th. It appeared, further, that the Appomattox Iron Works were manufacturers of machinery for this purpose at Petersburg, Va. That the defendant road extends through eastern North Carolina and Virginia, and large quantities of peanuts are annually shipped from this place. Williamston, over defendant's road; that from the time the machinery should have arrived plaintiff had a house rented in which to place it for the purpose of manufacturing and a lot of hands, two of them experts, awaiting to install and operate the same, and these hands were drawing wages and necessarily kept idle for the time of the delay, and that the capital invested in the machinery was about \$2,000. On the question of notice, plaintiff offered the following evidence by the witness Gurganus: "On the 1st day of September, 1907, I went to the agent of the Coast Line at Williamston, and notified him of the car load of peanut machinery being shipped from Petersburg, Va., and told him that the company had men hired to install this machinery, and told him that the men were on the ground ready for work, and that the peanut company would hold the Coast Line for damage for all delay. I continued to go to the agent each day till the 19th, when machinery came and repeated the same thing." On objection by defendant, this evidence was excluded and plaintiff excepted. Plaintiff then offered the following evidence by J. G. Staton, president of plaintiff company: "On the 1st of September, 1907, I went to the agent of the defendant company at Williamston, N. C., and notified him that this car load of machinery had been shipped, told him that plaintiff company had men hired to install this machinery, and that company would hold defendant liable for any further delay. I told him that the men were on the ground ready for work, and that the plant was idle. I went to see agent every day from the first to the 15th of September about it, and repeated the same thing to him. I helped agent wire for machinery on the 15th of September, and we located it in Wilmington, N. C." This was likewise excluded, and plaintiff excepted. The court charged the jury that "in no event could they, on the evidence, allow any more than nominal damages." Plaintiff excepted. Verdict awarding nominal damages. Judgment, and plaintiff excepted and appealed.

*Martin & Critcher and Winston & Matthews, for appellant.
F. S. Spruill and Harry W. Stubbs, for appellee.*

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HOKE, J. (after stating the facts as above). In *Harper v. Express Co.*, 148 N. C. 87-90, 62 S. E. 145, 146, 128 Am. St. Rep. 588, the court in speaking to the question of damages recoverable by reason of wrongful delay in shipment of goods said: "Where the goods shipped have a marked value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. Railroad*, 147 N. C. 503, 61 S. E. 381; and *Lee v. Railroad*, 136 N. C. 533, 48 S. E. 809, is to the same effect. When, however, the goods are ordered for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages"—citing *Moore on Carriers*, p. 425, and *Hutchinson on Carriers*, § 1367. The modification of the general rule suggested in this excerpt is not infrequently called for in shipments of machinery, and under several decisions of our court on this subject it may be that the facts now in evidence require that the question of substantial compensatory damages arising by reason of notice or knowledge of special circumstances had at the time of shipment should be submitted to the jury. *Lumber Co. v. Railroad*, 151 N. C. 23, 65 S. E. 460; *Sharpe v. Railroad*, 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. Without final determination of this matter, however, we are of opinion that there was error in excluding the testimony offered by plaintiff to show definite notice of special circumstances given after shipment made. True, the bill of lading was issued to the witness Gurganus, but it is also true that he had no personal interest in the goods or their shipment, but was acting at the time for the plaintiff company, "which had purchased the machinery, paid for it, received it upon arrival at Williamston, and there paid the freight charges thereon, and installed same in its plant." From these facts we see no reason why the plaintiff company; as undisclosed principal, did not acquire and hold the general business rights and interests arising from the contract and under the general principles obtaining in case of such a relationship. *Nicholson v. Dover*, 145 N. C. 20, 58 S. E. 444, 13 L. R. A. (N. S.) 167; *Barham & Owens v. Bell*, 112 N. C. 131, 16 S. E. 903; *Clark &*

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Skyles on Agency, p. 1155; Tiffany on Agency, pp. 304, 305. In case of Barham v. Bell, supra, it was held: "Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same position at the time of the disclosure of the real principal as if the agent had been the real contracting party." And in more general terms in Clark & Skyle, supra, it is said: "It is held, therefore, that where a person enters into a simple contract other than a negotiable instrument in his own name, but, in fact, as agent for an undisclosed principal, the principal may come in and sue the third party on the contract, and this is true, not only where the agent disclosed the existence, but not the name of the principal, but also where he does not even disclose the existence of the principal." A principle undoubtedly correct, where, as in this case, neither the personality of the agent nor the claims of the third party against him personally require consideration. This then being the position of the parties, if the nominal consignee and the president of the plaintiff company gave the notice embodied in the proposed evidence, and there was negligent delay on the part of the defendant after being afforded full and reasonable opportunity to correct the wrong, such negligence would constitute a tort, giving the plaintiff right to recover damages on facts as they then appeared. This is one principal difference in the elements of damages obtaining in breach of contract and consequential damages arising from a tort. In the one case damages are recovered as a rule on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other, on the facts existent or as they reasonably appeared to the parties at the time of the tort committed. The obligation of diligence imposed by the law on common carriers is continuous during the entire course of the carriage, and a negligent failure to perform such duty, causing special damage to a passenger or shipper of freight, is a tort arising whenever the same occurs. We must not be understood as holding that this consequential damage to arise by reason of special circumstances would commence at the very instant the notice was given to some local agent of the company. The notice, as indicated, must be such as to afford fair and reasonable opportunity to avoid further delay under conditions as they existed when the notice was received, and damages arising thereafter might then be properly estimated under the circumstances which the notice discloses. There is suggestion from authoritative sources that in these continuous contracts of carriage notice of special circumstances given during the course of performance would be relevant as affecting the question of the amount of damages, even when the action could only be considered as one for a breach

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of contract. This was made by Bramwell Baron in the case of *Gee v. Railway* (Exch.) 6 H. & N. 211, and referred to in *Wood's Mayne on Damage*, p. 35. This suggestion was applied by a Texas court in the case of *Railway v. Gilbert*, and was at first affirmed on appeal, but was afterwards rejected; the Court of Civil Appeals holding on a rehearing that notice given, after contract, of shipment made, should not be allowed to affect the question. *Railway v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320. In a subsequent case, however, and on a different state of facts, the Supreme Court of Texas seems to have modified this ruling. *Bourland v. Railroad*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647. The digest of this case as it appears in 122 Am. St. Rep. 647, is in part as follows: "The rule that damages of a special or exceptional kind for delay in the shipment of goods cannot be recovered in the absence of notice to the carrier at the time of making the contract of carriage of the particular conditions under which the damages are likely to arise as the result of the delay is not unbending nor applicable to every case." The question is not free from difficulty, nor is it necessary to determine it on the present appeal, for numerous and well-considered decisions in this jurisdiction are to the effect that for breach of duty in reference to a contract of carriage on the part of common carrier doing business under a corporate franchise one having a right by contract to enforce performance may recover damages for a tort, and have the relief administered and his rights determined as in that class of actions. *Williams v. Railroad*, 144 N. C. 498-505, 57 S. E. 216, 12 L. R. A. (N. S.) 191; *Purcell v. Railroad*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; *Bowers v. Railroad*, 107 N. C. 721, 12 S. E. 452. In *Purcell's Case* and on this question it was held: "(1) It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. (2) A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by the statute (the Code, § 1963) may bring an action on contract or in tort, independent of the statute."

And in *Bowers' Case*, supra, the ruling was as follows: "(1) A complaint alleging that the defendant, a common carrier, failed to safely carry certain articles of freight according to contract, and 'so negligently and carelessly conducted in regard to the same that it was greatly damaged,' states facts sufficient to constitute a tort." And in *Williams' Case*, supra, Associate Justice Walker, for the court, said: "It is established, there-

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fore by the authorities, that when the carrier has wrongfully set the passenger down short of or beyond his destination, or has failed to stop for him, and has thereby imposed upon him the necessity of reaching his destination by other means, the carrier must respond in damages for the wrong, whether the action be brought for the breach of the contract or for the tort, and the rule applies in this case if the plaintiffs presented themselves at the proper place and gave the required signal at such time as enabled the engineer to stop the train for them at the station"—citing 3 Hutchinson on Carriers (3d Ed.) § 1429. There is nothing in the record which confines the plaintiff to recovery for a breach of contract. On the contrary, the entire facts are set out by the pleader, including specific statement of the special damages claimed. And in various sections of the complaint the delay is alleged to have been caused by the carelessness and negligence of the defendant company and its agents. In such case the plaintiff, if the facts justify it, may recover on the theory of tort or contract. Speaking to this question, in *Williams' Case*, supra, it is further said: "All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs which is denominated a civil action, and the court gives relief according to the facts alleged and established." In the case of *Hansley v. Railroad*, 117 N. C. 570, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600, a case much relied upon the defendant, the court chiefly considered and passed upon the right of a passenger, on a breach of contract of carriage by a common carrier, to punitive or exemplary damages, and the question involved in this appeal was not directly presented. While the reasoning of the principal opinion in *Hansley's Case* is favorable to defendant's position, the decision of the court, reaffirming, as it did, *Purcell's Case*, supra, which was an action in tort for like cause, is in support of our present ruling. The plaintiff then had a right to sue in tort, and, if his cause of action is established, recover damages under circumstances existent at the time the same was committed, and the evidence offered, tending as it did to show conditions affecting the measure of his recovery, should have been received. There is nothing here said which is intended to militate against the ruling of this court in *Helms v. Telegraph Company*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, and other cases to the same effect, "that a party who is not mentioned in a telegraph message or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish." In *Helms' Case* the contract had been finally broken, and the same was no longer in the course of performance, and, the question at issue being the amount of damages for "mental anguish," the personality of the party and his relationship to the subject of the message

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was of the substance, and must be made to appear. But the principle does not necessarily obtain when redress is sought for breach of business contract, in which, as stated, the personality of the nominal parties in no way affects the matter. In such case, as heretofore said, the rights of the parties may be shown and dealt with under the ordinary doctrine that an undisclosed principal may avail himself of rights acquired by the contract of his agent.

For the error in rejecting the evidence offered, the plaintiff is entitled to a new trial, and it is so ordered.

New trial.

COMMONWEALTH ex rel. BREATHITT, Atty. Gen., v. LOUISVILLE & N. R. Co. et al.

(Court of Appeals of Kentucky, June 21, 1911.)

[138 S. W. Rep. 291.]

Railroads—Consolidation—Parallel or Competing Lines.—Const. § 201, prohibiting consolidation of "parallel or competing" railroads, should not be read "parallel and competing."

Railroads—"Parallel Lines."—Two parallel lines of railroad are not necessarily two lines equidistant from each, but are lines running in one general direction, traversing the same section of country, and running within a few miles of each other. Two lines are parallel when they run between the same two points or localities.

Railroads—Consolidation—Parallel Lines.—Character of a railroad line as one of two parallel lines, which under Const. § 201, must not be consolidated, is not affected by an unexecuted original plan of construction.

Railroads—Consolidation—Parallel Lines.—Character of two railroad lines as parallel lines as to three points within the prohibition of consolidation thereof by Const. § 201, is unaffected, because one of the roads owns another branch which is not parallel, nor because through trains are not run on one of the lines.

Railroads—Consolidation—Parallel Lines.—Two railroad lines serving three important points in common, and distant from each other at an average of about eight miles, are parallel, under the prohibition of consolidation by Const. § 201.

Railroads—Consolidation—Competing Lines.*—As affecting the character of a railroad line as a competitor, within Const. § 201, pro-

*For the authorities in this series on the subject of the legality of combinations between carriers to prevent competition, see foot-note of *State v. Superior Court* (Wash.), 31 R. R. R. 349, 54 Am. & Eng. R. Cas., N. S., 349.

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hibiting consolidation of competing lines, the fact that competition is afforded by intersection with a third line can be considered.

Railroads—Consolidation—Parallel or Competing Lines.*—Consolidation of parallel or competing railroad lines, in violation of Const. § 201, cannot be upheld because it gives the public better service, nor because one of the lines cannot be operated independently at a profit.

Appeal from Circuit Court, Franklin County.

Action by the Commonwealth of Kentucky, on the relation of James Breathitt, Attorney General, against the Louisville & Nashville Railroad Company and another. Judgment dismissing the petition, and plaintiff appeals. Reversed and remanded.

Jas. Breathitt, Atty. Gen., and Theo. B. Blakey and Jno. Francis Lockett, Asst. Attys. Gen., for appellant.

Henry L. Stone and McQuown & Beckham, for appellees.

HOBSON, C. J. By an act approved March 18, 1871 (Loc. Laws 1871, c. 1669), the Frankfort, Paris & Big Sandy Railway Company was incorporated, and authorized to construct a line of railway from Frankfort by way of Georgetown, Paris and Owingsville to a point at or near the mouth of the Bid Sandy river. At the same session of the Legislature another act was passed incorporating the Paris; Georgetown & Frankfort Railway Company, which was authorized to construct a railroad from Paris to Frankfort or to a point on the Lexington & Louisville Railroad near Frankfort, as might be deemed best. Under the powers granted to each of these companies, they were consolidated on February 14, 1881, under the name of the Paris. Georgetown & Frankfort Railway Company. Afterwards by an act approved February 24, 1888, the name of the company was changed to the Kentucky Midland Railroad Company, and it was authorized to extend its line or lines of railroad to the eastern boundary of Kentucky on the Big Sandy river along any route or routes it might select. This company built a line of railroad from Frankfort by way of Georgetown to Paris. The county of Franklin, the city of Frankfort, and citizens of Frankfort subscribed for the stock of the road, so did Scott County, Bourbon county, and the city of Paris; and the road was built by the aid of these subscriptions. The subscription of the city of Paris was payable when the road reached that point and was paid when the road was built to Paris. The subscription of Bourbon county was payable when the road was constructed to a certain point east of the county, and, the road not having been constructed beyond Paris, the subscription was not paid. After the road had been constructed to Paris the company fell into financial difficulties. It owed the contractors who had built

See () on preceding page.

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the road to that point about \$600,000, and, it being unable to raise the money, finally a suit was brought, and in that action the road was ordered sold. It was purchased by the contractors, who thereupon incorporated the Frankfort & Cincinnati Railroad Company on February 27, 1897, which operated the road from that time on. In the year 1901 Charles E. Lewis of New York brought from the owners for \$325,000 all the stocks and bonds of the Frankfort & Cincinnati Railroad Company. The organization of that company was continued as it had been before, and the railroad was operated by it until the year 1909, when the Louisville & Nashville Railroad Company, for whom Lewis had brought the stocks and bonds in 1901, took over the property, and has since operated the road as a part of its system. The Louisville & Nashville Railroad Company, hereinafter called the "L. & N.," owns a line of railroad running from Covington through Paris to Lexington, also a line running from Lexington through Frankfort to Louisville. The line of the L. & N. Railroad from Paris to Frankfort by way of Lexington is 48 miles long. The line of the Frankfort & Cincinnati Railroad Company, hereinafter called the "F. & C.," from Paris to Frankfort by way of Georgetown, is 40 miles long. The two lines are about 12 miles apart at their greatest divergence, and will average about 8 miles apart for the whole route. The F. & C. crosses at Georgetown the Cincinnati Southern Railroad which runs from Cincinnati to Chattanooga, and by means of this connection it furnishes to both Frankfort and Paris competition with the L. & N. as to all freight to be shipped either north or south. It also connects there with the Southern Railroad Company in Kentucky, which owns lines running from Louisville to various points south.

Section 201 of the Constitution is as follows: "No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common carrier company, owning a parallel or competing line or structure, or acquire by purchase, lease or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railway company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying." Section 769, Ky. St. (section 5369, Russell's St.), also provides: "Any company may build such spurs, switches, tracks or branches as may be necessary to conduct its business or develop business along its line of road, and for that purpose shall have all the powers and be subject to the same restrictions and liabilities as are conferred upon it for the

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construction of its main line; and may purchase the property and franchises of any other railroad company at public or private sale, not a competing or parallel line; and may sell its franchises and property to any other company not a competing or parallel line or otherwise prohibited by law, to purchase, and may, unless prohibited by law, subscribe to the capital stock of any other railroad company organized under the law of this or any other state, with the assent of such company, and any company organized under the laws of this, or any other state, may, unless prohibited by law, subscribe to the capital stock of any company organized under this law, with the assent of such company, and may make any agreement or arrangement, not inconsistent with law, with any other railroad company." This action was brought by the commonwealth on the relation of the Attorney General against the two railroad companies to enjoin the taking over of the F. & C. by the L. & N., and to annul what had been done between the two companies, on the ground that the two lines were parallel and competing; that the L. & N. could not under the Constitution acquire by purchase, lease or otherwise, any parallel or competing line, or consolidate its capital stock, franchises, or property, or pool its earnings in whole or in part with any other railroad company owning a parallel or competing line, and that under section 769 of the statute the power of the F. & C. to sell and the power of the L. & N. to buy did not extend to a competing or parallel line. An answer was filed traversing the allegations of the petition, and voluminous proof was taken. The proof for the plaintiff showed these facts: The purpose of the incorporation and construction of the Kentucky Midland Railroad was to obtain competition in railroad rates at Paris, Georgetown, and Frankfort, Paris and Frankfort having then only the L. & N. Railroad and Georgetown only the Cincinnati Southern; that with this view the subscriptions of the city of Frankfort, Franklin county, Scott county, and the city of Paris were made. It is further shown that these subscriptions were also made for the purpose of obtaining an outlet eastward through the coal and timber sections of the state, so that coal and timber might be brought in to the cities named, and that it was not contemplated then that the road would stop at Paris. After the F. & C. was built and while it was operated, competitive rates were in force at Paris, Georgetown, and Frankfort. The passenger rate from Frankfort to Cincinnati before the F. & C. was operated was \$4. This was lowered to \$2.80 as soon as the road was put in operation, and has since so remained. There was a through tariff on coal from the Jellico district by way of the L. & N. or by way of the Cincinnati Southern, while the F. & C. was operated as an independent road. After the L. & N. took over the property, the through tariff was taken off and local charges were made. A similar increase in price was made on

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wheat shipped south, hemp, bluegrass seed, and the like. Since the consolidation there has been more trouble to get cars than there was before. Switching charges are now added. This was not done before. The trains are not now so operated as to connect with the Cincinnati Southern, and stock intended for it has to lie over. There is also evidence in the record tending to show that, when there was difficulty in getting cars from one railroad, the other would furnish them as long as there was competition between the L. & N. and the Cincinnati Southern for the business at Paris, Georgetown, and Frankfort. As things now are, the L. & N. has no competition at Paris or Frankfort, and the Cincinnati Southern has no other competition at Georgetown, as the Southern Railway in Kentucky is a part of its lines.

On the other hand, the proof for the defendant showed these facts: When the L. & N. took charge of the F. & C., the ties of the railroad were rotten, the trestles were much decayed, and the road was not safe for trains. Heavy cars and engines could not be run over it, and many persons were afraid to ride on the passenger trains. The road had never made any money. It had had great difficulty to pay the interest on its bonded debt, \$200,000, and to meet operating expenses. It had not had a surplus sufficient to keep the property in order. The F. & C. had two locomotives, two freight cars, two passenger cars, and one caboose. It had no other rolling stock. When the L. & N. took over the road, it spent about \$3,300 on this rolling stock before it was considered fit to be further used on the road. It spent in new timber for the road in that year about \$40,000, and a considerable additional expense is still needed, especially in the way of improvements at the depots, putting in stock pens, and the like. One witness describes the road as a "lame duck," another says its condition was "the limit." Its operating expenses were about 84 per cent. of its earnings, and very little for 10 years had been put in repairs. The freight tonnage of the F. & C. between Paris and Frankfort was about 1½ per cent. of its whole freight tonnage, and the passenger business was about in the same ratio. The proof for the defendant by a number of witnesses was to the effect that an independent company could not profitably operate the road. The L. & N. owns a branch running from Maysville to Paris. The F. & C. is practically in direction a continuation of this branch, and since the L. & N. took charge it has operated through passenger trains from Maysville to Frankfort, connecting there with the trains to and from Louisville and the trains to and from Beattyville, thus greatly improving the passenger service along the line. It has also run fuller and larger freight trains, and has furnished to shippers along the road better conveniences than they enjoyed before. Frankfort has about 12,000 people, Georgetown about 6,000, Paris about 8,000, and Lexington

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about 35,000. It is 18 miles from Frankfort to Georgetown, 22 miles from Georgetown to Paris, 29 miles from Frankfort to Lexington, and 19 miles from Lexington to Paris. A number of witnesses residing at Frankfort, Georgetown, and Paris testify that it will be to the interest of the people at each of these cities and also to the interest of the public for the L. & N. to take over the F. & C., for the reason that the through trains give them advantages they would not otherwise have; that the L. & N. is putting the road in good shape, and making it both safe and serviceable to the public; and that, if the rates can be controlled by law, it will be much to the interest of the public that the L. & N. be allowed to retain the road.

On these facts the circuit court held that the purpose of section 201 of the Constitution is to prevent the stifling of competition; that the words "parallel or competing" should be read "parallel and competing;" that the F. & C. was in such a condition that it was not able to do a successful business, and so it was not possible for it to compete for business with any other road; that it was not possible for an independent company to take charge of it and operate it so as to make money; that this had been tested for 20 years, and had failed; that the F. & C. could not offer any substantial competition, and that its existence could have no appreciable effect on the question of freight or passenger rates of other lines. For these reasons he dismissed the petition. The commonwealth appeals.

[1] We cannot concur with the circuit court in holding that the words "parallel or competing" in the constitutional provision should be read "parallel and competing." A constitutional provision is mandatory, and, there being nothing in the constitutional provision to show that the word "or" was used in the sense of "and" it is not permissible in so solemn an instrument as a state Constitution to substitute "and" for "or." It will be observed that the phrase occurs twice in the section. It is also repeated by the Legislature in section 769, Ky. St., with the difference that there it reads "competing or parallel."

[2] Two parallel lines of railroad are not necessarily two lines equidistant from each but are lines running in one general direction, traversing the same section of country, and running within a few miles of each other. Two lines are parallel when they run between the same two points or localities. *East St. Louis, etc., R. Co. v. Jarvis*, 92 Fed. 735, 34 C. C. A. 639; *State v. Montana R. R. Co.*, 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; *Penn. R. Co. v. Commonwealth (Pa.)* 7 Atl. 368. It was perceived by the makers of the Constitution that, if there were two lines of railroad between two localities, there would be more or less competition between them, and so they provided that one should not buy the other. But they foresaw that competition might exist when the lines were not parallel, and so to preserve

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competition they prohibited one road from purchasing a competing line. If the line purchased is a parallel or a competing line, the purchase is within the inhibition of the Constitution.

[3] It is insisted for the railroad company that the F. & C. is not a parallel line because the original plan was to construct a railroad from Frankfort eastward to the Big Sandy, and, if the line had been built as planned, it would not be parallel to the lines of the L. & N. But as a matter of fact the design of building to the Big Sandy was abandoned more than 20 years ago. The F. & C. has simply owned and operated the road from Frankfort to Paris, and the result of the case cannot in any wise be affected by the design of the original corporation which began and built the road as far as Paris.

[4] It is also said that the line of the F. & C. should be regarded simply as an extension of the Maysville branch and not as a parallel or competing line. It is not a parallel line to the Maysville branch, but it is a parallel line to the line of the L. & N. from Paris to Frankfort by way of Lexington. The F. & C. being a parallel line to the railroad running from Paris to Frankfort by way of Lexington, it is not material that the L. & N., which owns this road, also owns another branch which is not a parallel line. Nor is it material that the L. & N. does not run through trains from Paris and Frankfort by way of Lexington, but breaks up its trains at Lexington. This is a mere matter of operation, and may be changed to-morrow. The two lines both run from Paris to Frankfort.

[5] The average distance between them is about eight miles, and it seems to us that they are clearly parallel lines within the meaning of the Constitution.

[6] It is insisted for the railroad company that the F. & C. of itself cannot afford substantial competition, and that we cannot consider the fact that it does afford competition by reason of its intersection with the Cincinnati Southern. We are referred to a *nisi prius* decision in South Carolina so holding, but we cannot concur in the conclusion. As long as the F. & C. maintains a separate existence, Frankfort is a competitive point as to railroad rates, so is Georgetown, and so is Paris. When the L. & N. acquires the F. & C., neither Frankfort nor Paris will be a competitive point; for the only railroad running through them will be controlled by the L. & N. As long as the F. & C. is independent, shippers at Frankfort or Paris can get competitive rates to all points north, east, south, or west by reason of the F. & C. and its connections at Georgetown; and, as long as the F. & C. is not controlled by the Cincinnati Southern, Georgetown will enjoy similar competitive rates. It was the plain purpose of the Constitution to protect the people of the state from the destruction of competition by one road buying another which afforded them this protection. It is not material how long the road is

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when it owns all the line necessary to furnish the competition. If, by means of its connecting lines, it furnishes competition, it is a competing line within the meaning of the Constitution. To hold otherwise would be to destroy the value of the constitutional provision; for in this event one strong corporation might buy some part of the connecting lines or some branch necessary to furnish transportation, and thus trifle competition in violation of the Constitution. When we take into consideration the connections of the F. & C., we think it evident that it does furnish competition to the L. & N. both at Frankfort and at Paris, and also furnishes competition to the Cincinnati Southern at Georgetown. It is a substantial competition because otherwise these three cities would be just in the position they were before the road was built, and they made their subscription towards the road largely for the purpose of getting the competitive rates which the access to two lines of railroad would bring to them.

[7] The evidence warrants the conclusion that all things considered the public will be better served by the L. & N. owning the F. & C. and operating it; and, if we could take this matter into consideration, we would concur in the judgment of the circuit court. But the constitutional provision contains no exception of this sort. To uphold the purchase on this ground would be to say that a purchase of a parallel or competing line may be made when under all the circumstances the public would be thus best served, while the Constitution provides that a parallel or competing line shall not be purchased. We cannot add to the words of the Constitution or write an exception into its positive provisions.

It may be true that the F. & C. was a lame duck, or that its condition was the limit, still it was a going concern; and, while it had little rolling stock, it was able to get all the rolling stock it wanted from one railroad or the other. If one did not furnish it, the other would to get the business. It is true it could not have lived but for the liberal traffic arrangements it made with these roads, but both were interested in keeping it alive as a feeder of its lines, and each was anxious to get from it all the business it could. It is not material that an independent company cannot operate the F. & C. profitably. The constitutional provision is applicable to all cases. It cannot be limited to lines which may be profitably operated. Constitutional provisions are of no value unless enforced as written. If, as thus enforced, they work hardship, the remedy must be applied by the people, and not by the courts. To write into a constitutional or statutory provision words which the makers did not put there is to unmake the law, not to enforce it, unless there is enough on the face of the instrument to show this to be its meaning. To give a Constitution an elastic construction is to destroy its value, and defeat the purpose for which it was made. The purpose

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of a Constitution is to establish certain fixed principles which shall control the state. When the instrument is not read according to its terms, then the principles on which the state is conducted will not depend upon the words of the instrument, but upon the predilections of those in charge of it. Many of the South American states have constitutions just as carefully drawn as ours, and they have failed in their purpose, not because they are not expressed in proper words, but because they have been given an elastic construction under which they have been made to mean what those in power wished them to mean. Whether this is done in the supposed interest of the public or in the interest of those in power matters not. In either event, no one can tell what the Constitution means in advance, and its meaning will shift from time to time as the necessity of the case requires. The only safe rule is to enforce the Constitution as written, and to leave it with the people to amend the Constitution and to provide the remedy if it is found to work injustice.

When the F. & C. began business, it had no rolling stock, not even a wheel barrow. It rented all the rolling stock it used. Its gross earnings from March 1 to June 1, 1897, were \$16,490.01. For the following years up to 1901 its gross earnings were respectively, as follows: 1897-98, \$53,531.18; 1898-99, \$60,107.71; 1899-1900, \$67,314.80; 1900-01, \$78,775.94. This brings us up to the time when the stock of the company was bought by Lewis for the L. & N. Its earnings since that time have been as follows: 1901-03, \$84,908.45; 1902-03, \$76,994.99; 1903-04, \$78,296; 1904-05, \$82,361.95; 1905-06, \$95,589.53; 1906-07, \$112,192.84; 1907-08, \$106,019.56; 1908-07, \$109,034.32. It will thus be seen that the earnings of the company have steadily increased, and that they are now something more than double what they were when the F. & C. began operating it, and out of its earnings paid the interest on its bonds, the rent of its rolling stock, and current expenses. It also out of its earnings bought the rolling stock which it had when the L. & N. took it over. While these figures do not show that an independent company could operate the road so as to make a large profit, they do not show that the road cannot with proper management be operated by an independent company. If experience should demonstrate that owing to the shortness of the road it cannot be profitably operated by steam, it may be more satisfactorily operated as an electric line.

There are many circumstances shown in the record demonstrating the importance of this road being operated as an independent line. The following is illustrative of others: A merchant in Frankfort needed 27 cars to ship out sand. He applied to the agent of the L. & N. at Frankfort for cars, and was told that it was absolutely impossible to get them. He then applied to the F. & C., and was told that it could get the

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cars through the Cincinnati Southern, and would have them here the next morning. The next morning the cars came, and the sand was shipped. The next day the general agent of the L. & N. called on the merchant and told him that the station agent had made a mistake, that the L. & N. could furnish him cars whenever he needed them, and to let him know when he needed cars again. Millers on the L. & N. between Paris and Maysville have to haul their wheat or product to Paris and ship it from there as they are unable to get the same rates from their stations as are given at Paris. These are only given as illustrations. There are many such things proved in the record showing the wisdom of the constitutional provision, and the importance of it to the people of the state. If the judgment of the circuit court is sustained, there will be no railroad communication with the capital of the state except over the L. & N. The F. & C. was built to avoid this very thing.

In the year 1892, the L. & N. Railroad Company bought the Chesapeake, Ohio & South Western Railroad Company and its allied corporations. Thereupon a suit was brought by the commonwealth to enjoin the L. & N. Railroad Company from taking over the property or owning or operating the railroads on the ground that the purchase was in violation of section 201 of the Constitution. This court held that they were parallel and competing lines, and entered a judgment in favor of the commonwealth as prayed in the petition. See *L. & N. R. Co. v. Commonwealth*, 97 Ky. 675, 31 S. W. 476, 17 Ky. Law Rep. 427. An appeal was taken from that judgment to the Supreme Court of the United States, and on the appeal the judgment was affirmed. See *L. & N. R. R. Co. v. Ky.*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. We do not see that this case can be distinguished from that.

Judgment reversed and cause remanded for a judgment as above indicated.

E. M. DELK, Petitioner, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

(Argued March 9, 1911. Decided May 15, 1911.)

[31 Sup. Ct. Rep. 617.]

Commerce—Safety Appliance Act—Cars “Used in Interstate Commerce.”*—A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations.

Master and Servant—Safety Appliance Act—Reasonable Care.—An absolute duty to provide every car used in moving interstate traffic with automatic couplers, and to maintain them in proper condition at all times and under all circumstances, is imposed upon interstate carriers by the safety appliance act of March 2, 1893, which was not discharged by properly equipping the car with automatic couplers, and using due diligence to keep them in good working order.

Trial—Directing Verdict—Discrepancy in Testimony.—The trial court properly refused to charge as a matter of law that the evidence established the defense of contributory negligence, where the testimony on that question was such as to leave fair ground for difference of opinion.

Courts—Disposition of Cause.—A reversal on certiorari for error in construing the safety appliance act of March 2, 1893, of the judgment of a circuit court of appeals reversing a judgment of a circuit court in favor of an employee in an action against a carrier to recover damages for personal injuries alleged to have been caused by its negligence, furnishes no reason for disturbing the judgment of the trial court, where no error of law appears to have been committed in that court to the prejudice of the carrier.

On writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for Western District of Tennessee, in favor of an employee in an action to recover damages from a carrier for personal injuries alleged to have been caused by its negligence. Reversed, and judgment of the Circuit Court affirmed.

*For the authorities in this series on the question whether or not cars were being used in interstate commerce on a particular occasion, see foot-note of *Felt v. Denver, etc., R. Co.* (Colo.), 37 R. R. R. 735, 60 Am. & Eng. R. Cas., N. S., 735; second head-note of *Johnson v. Great Northern Ry. Co.* (C. C. A.), 37 R. R. R. 617, 60 Am. & Eng. R. Cas., N. S., 617.

Delk v. St. Louis, etc., R. Co

See same case below, 86 C. C. A. 95, 158 Fed. 931, 14 A. & E. Ann. Cas. 233.

The facts are stated in the opinion.

Messrs. Luther M. Walter, W. A. Percy, and T. F. Kelley, for petitioner.

Messrs. Edward T. Miller and W. F. Evans, for respondent.
Assistant Attorney General Fowler and Mr. Barton Corneau, for the United States as amicus curiæ.

MR. JUSTICE HARLAN delivered the opinion of the court:

The St. Louis & San Francisco Railroad Company, a Missouri corporation engaged in commerce as a carrier of freight and passengers through Tennessee and other states, was sued in one of the courts of Tennessee by the petitioner, Delk, for damages alleged to have been sustained by him while engaged in the discharge of his duties as an employee of the company. On the petition of the railroad company the case was removed to the circuit court of the United States on the ground of diversity of citizenship.

The declaration contained several counts, but the basis of the plaintiff's claim is the alleged failure of the railroad company to provide proper automatic couplers, as required by the act of Congress of March 2d, 1893, known as the original safety appliance act. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. The company filed a plea, putting in issue the material allegations of the declaration. It also proceeded on the ground that the injuries complained of were caused by the plaintiff's own fault in not observing proper care in doing the work in which he was engaged when injured.

Upon a trial of the case in the Federal court there was a verdict and judgment in favor of the plaintiff for \$7,500. The company moved for a new trial, and the trial court indicated its purpose to grant that motion unless the plaintiff by remittitur reduced the verdict and judgment to \$5,000. The plaintiff complied with that condition, and judgment was entered against the company for the sum last mentioned. In the circuit court of appeals the judgment was reversed and the case remanded for a new trial. 86 C. C. A. 95, 158 Fed. 931, 939, 940, 14 A. & E. Ann. Cas. 233. Thereafter this court allowed a writ of certiorari.

The title of the safety appliance statute declared it to be "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-wheel Brakes, and for Other Purposes," 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174.

The provisions of the act, so far as it is material to set them

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out, appear in the opinion of *Chicago, B. & Q. R. Co. v. United States*, just decided. [220 U. S. —, ante, 612, 31 Sup. Ct. Rep. 612.] The circuit court of appeals well said, in the present case, that while the general purpose of the statute was to promote the safety of employees and travelers, its immediate purpose was to provide a particular mode to effect that result; namely, the equipping of each car used in moving interstate traffic with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The material facts out of which the suit arises, and as to which there seems to be no dispute, are these: The defendant company received lumber to be carried from Giles, Arkansas, to Memphis, Tennessee. In order that the consignee might receive the lumber, the car containing it was delivered, October 2d, 1906, to the Union Railway Company, known as the Belt Line. But it was promptly returned the next day to the present defendant because of a defect in the coupling and uncoupling appliance on one end of it. The car in question was in a new yard of the defendant company, and was in a "string" of nine cars on what is known as "the dead track" in that yard. This track was called a team track, because it was so arranged that teams might be loaded and unloaded from alongside it.

On the morning after the return of the car, October 4th, 1906, Delk, acting under instructions of the agent of the defendant company, undertook to switch certain cars out of the string of nine cars, so as to get two empty cars and three coal cars for removal to some other part of the company's line. The remaining facts upon which the circuit court of appeals proceeded cannot, that court said, be better stated than they are in the brief for the Interstate Commerce Commission, in whose behalf special counsel appeared in that court. Those facts are set out in the opinion of the court below as follows: "The cars were on the track, extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on

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car K. C., F. S. & M. No. 21,696, was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers could couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about 3 inches by 6 inches upon the car, and with a blue pencil wrote on said card, 'Out of Order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the 3d, until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred. There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employee to go to the repair shops which were some 2½ miles distant, and get the material for repairing the coupler, but that the employee did not return until after the accident. The trial court held that the safety appliance act applied to the car with the defective coupler, and that by virtue of § 8 of said act. plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

The majority of the circuit court of appeals (Judges Severens and Richards) held that the car, with the defective coupler, was, at the time of the injury in question, and within the meaning of the act, engaged in interstate commerce. Judge Severens said: "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not reached its destination, and was not then ready for the delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred,"—citing *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Chicago, M. & St. P. R. Co. v. Voelker*, 70 L. R. A. 264, 65 C. C. A. 226, 129 Fed. 522. Judge Richards said: "The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. . . . After the coupler became defective, and could not be coupled

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without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received. . . . This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed." Judge Lupton expressed the view that the car in question was not employed in interstate traffic at the time the plaintiff was injured; and he was also of opinion that that question was, under the evidence, for the jury. We concur with the majority of the court below that the car in question was being used in interstate traffic when the plaintiff was injured.

Nor were the judges of the circuit court of appeals in accord as to the meaning and scope of the safety appliance act.—Judges Lurton and Severens holding that the statute, reasonably construed, did not impose on the carrier an absolute duty to provide automatic couplers of the kind specified by Congress, and did not subject the carrier to the penalties prescribed, if it appeared that due care and diligence were exercised in meeting the requirements of the act. Judge Richards was of opinion that the statute did not make care and diligence on the part of the carrier ingredients in the act condemned, and that, independently of any inquiry as to its care or diligence, the carrier was liable to the penalty, if the coupler used was not, in fact, such a one as the statute required. The circuit court of appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times. An order was therefore made reversing the judgment of the circuit court, and directing the case to be sent back for a new trial. But this court granted a writ of

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certiorari, and the case is here primarily for the review of the judgment of the circuit court of appeals.

The construction of the statute, adopted by a majority of the circuit court of appeals, to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, B. & Q. R. Co. v. United States*, just decided, and on the authority of that case, we hold that the circuit court of appeals erred in the particular mentioned.

One other matter requires notice particularly in view of the decision to-day in *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 1, ante, 561, 31 Sup. Ct. Rep. 561, in which it is held that under the original safety appliance act, and until that act was amended by that of April 22d, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), contributory negligence on the part of the party injured, where such negligence was the proximate cause of the injury, was a valid defense for the interstate carrier. It was contended at the trial of this case that the court erred in not instructing the jury, as matter of law, in accordance with the defendant's request, that the plaintiff was guilty of contributory negligence of such a character as to bar him from relief. The rule upon that subject is well settled by the authorities. It is that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. ed. 780, 783; *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. ed. 65, 66, 1 Sup. Ct. Rep. 18; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 615, 28 L. ed. 536, 537, 4 Sup. Ct. Rep. 533. In the *Doster* Case, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved. These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and the court's refusal to instruct the jury, as matter of law, that the evidence established the defense of contributory negligence, was right. We here give the charge of the trial court on the issue of contributory negligence: "If you conclude that he did that as a reasonably prudent man, with his experience and his observation and the facts and cir-

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cumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car was such that a reasonably prudent man, situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence; and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action; and that question I leave to you entirely without intimating any opinion about it." It thus appears that the question of contributory negligence was fairly submitted to the jury, and it was decided against the carrier. Upon the effect of the evidence relating to contributory negligence by the plaintiff, the circuit court of appeals declined to express any opinion, saying, "as the case must be remanded for a new trial, we need not express our opinion upon the evidence, which may not assume the same aspect upon the new trial."

In this state of the record, what must be done with the case? As the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the circuit court. *Lutcher & M. Lumber Co. v. Knight*, 217 U. S. 257, 267, 54 L. ed. 757, 761, 30 Sup. Ct. Rep. 505. In this view, the judgment of the circuit court of appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute under which the case arose imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. But, on looking further into the record from the circuit court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in *Chicago, B. & Q. R. Co. v. United States*, just decided. Nor did the circuit court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the circuit court of appeals, on the ground we have above stated, constitutes no reason why the judgment of the trial court should be disturbed.

For the reason stated, the judgment of the Circuit Court of

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Appeals must be reversed; but as we do not perceive that any error of law was committed in the Circuit Court, to the prejudice of the carrier, the judgment of the latter court must be affirmed. It is so ordered.

MR. JUSTICE LURTON did not participate in the decision by this court in this case.

CITY OF CHICAGO v. CHICAGO & O. P. ELEVATED R. CO.

(Supreme Court of Illinois, June 20, 1911.)

[95 N. E. Rep. 456.]

Street Railroads—License to Use Street—Obligation of Contracts—Right of Municipality to Revoke.*—The privilege of a street railroad company in the use of public streets, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for, if the grant is for an adequate consideration and is accepted by the railroad, then the ordinance ceases to be a mere license and becomes a valid and binding contract; and where, in case of a mere license, it is, prior to its attempted revocation, acted upon in some substantial manner, so that to revoke it would be inequitable, the same result is reached.

Street Railroads—Right to Use Streets—Revocation.*—Defendant company built and operated an elevated street railroad to the western limit of the city of Chicago, and an adjoining town, by ordinance; authorized the construction of a railroad from that point, and provided that it should run as a surface railroad, and permitted the building of a double track. The road was built as a double track railroad, parallel with and about nine feet from the tracks of an elevated steam railroad, which had inclosed its right of way by a concrete retaining wall and which crossed intersecting streets by bridges. In 1903, a part of the town was annexed to the city, and in 1909, while all the line was owned and operated by defendant, the city required the removal of the tracks lying parallel with the tracks of the elevated steam railway and within 15 feet of the end of any abutment wall supporting the tracks of an elevated railroad over intersecting streets, a compliance with which would limit defendant to one track and seriously impair its operation and revenues. Held, that as the town ordinance, by which the city was bound, was accepted and acted upon in a substantial manner, it constituted a contract binding upon the city and the defendant, and that as the ordinance of 1909 was, in effect, an attempt to revoke the earlier ordi-

*See first foot-note of *Wheeling, etc., R. Co. v. Triadelphia (W. Va.)*, 20 R. R. R. 336, 43 Am. & Eng. R. Cas., N. S., 336; foot-note of *Newport News, etc., Co. v. Hampton Roads, etc., Co. (Va.)*, 12 R. R. R. 543, 35 Am. & Eng. R. Cas., N. S., 543.

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nance granting that privilege, and to deprive defendant of property and rights acquired under the contract, it was invalid.

Street Railroads—Police Power—Regulation.†—A city has the right, under police power to regulate the use of the tracks and cars of a street railroad company in a reasonable manner.

Municipal Corporation—Police Power—Injury to Property.—The right of a city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the conduct of a lawful business, or to entirely suppress the use of property.

Street Railroads—Police Power—Use of Street Railroads.—A city cannot, by mere declaration, show the operation of a street constructed under authority of law to be a nuisance, and subject its tracks to removal, merely because its operation may be dangerous, since the public welfare declares that there should not be a discontinuance of the operation of an authorized railroad.

Appeal from Municipal Court of Chicago; John C. Scovel, Judge.

Suit by the City of Chicago against the Chicago & Oak Park Elevated Railroad Company to recover penalties for violations of an ordinance. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward J. Brundage, Corp. Counsel (*Charles M. Haft*, of counsel), for appellant.

Clarence A. Knight, *William G. Adams*, and *Edwin White Moore*, for appellee.

COOKE, J. This is a suit brought by the city of Chicago, appellant, against the Chicago & Oak Park Elevated Railroad Company, appellee, in the municipal court of Chicago, to recover penalties for 304 alleged violations of an ordinance of the city of Chicago.

Appellee, in 1890, was authorized by an ordinance of the city of Chicago to construct an elevated railroad in Lake street, in that city, from Wabash avenue to Fifty-Second avenue, which was then the western limit of the city. At that time the corporate name of the appellee was "The Lake Street Elevated Railroad Company." The road so authorized was shortly thereafter constructed by appellee. December 19, 1898, the town of Cicero passed an ordinance by which it authorized the Cicero & Harlem Railroad Company to construct a railroad from Fifty-Second avenue (which should connect with the road of appellee at that point) to Harlem avenue, in Oak Park. That ordinance provided that the road should descend by gradient from Fifty-

†See third foot-note of *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520; foot-note of *Chicago City Ry. Co.* (Ill.), 24 R. R. R. 240, 47 Am. & Eng. R. Cas., N. S., 240.

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Second avenue to Willow avenue, and thence from Willow avenue to Harlem avenue as a surface railroad, with tracks supported on ties, and further provided: "Said tracks shall be laid west of Willow avenue on Lake street and South boulevard with such rails and in such manner that carriages and other vehicles can easily and freely cross the same at street intersections without obstruction, and shall at all street crossings restore the grade and pavement to as good a condition as the same were before the laying of said tracks." This road was constructed in conformity with the provisions of the ordinance, and was then purchased by the Lake Street Elevated Railroad Company. To secure the funds necessary to purchase this road, the Lake Street Elevated Railroad Company issued its bonds to the amount of \$1,275,000. Since 1901 this road has been operated as part of the continuous line of the road, extending on Lake street from Wabash avenue to Harlem avenue, in Oak Park, a distance of nine miles. In 1903 the territory west from Fifty-Second avenue to Austin avenue on the line of this railroad—a distance of one mile—was annexed to the city of Chicago, and Austin avenue became the western city limit. Between Fifty-Second avenue and Austin avenue, the road intersects eight north and south streets. From Fifty-Second avenue west, the road of appellee is paralleled by the road of the Chicago & Northwestern Railway Company, a steam railway; the right of way of the railway company extending along the north line of Lake street and South boulevard. By the said ordinance of the town of Cicero, it was provided that the tracks of the Cicero & Harlem Railroad Company should be placed on the north 32 feet of the street for a part of the distance and on the north 28 feet of the street for the remainder of the route, and permitted the building of a double-track railway. In 1906 the city council of the city of Chicago passed an ordinance requiring the appellee and the Chicago & Northwestern Railway Company to elevate their roadbeds and tracks as far west as Austin avenue. This ordinance required the acceptance of each company within 90 days after its passage, before it should become effective as to such company, and provided by its terms that in case it was not so accepted the ordinance should be considered null and void as to the company not accepting. The Chicago & Northwestern Railway Company accepted this ordinance, but appellee declined to do so. The steam railway company thereupon proceeded to elevate its roadbed and tracks as far west as Austin avenue, which work was completed in 1909. The roadbed was inclosed on both sides by a concrete retaining wall 20 feet high, built on the boundary lines of the right of way. The roadbed is carried over the intersecting streets by bridges, supported by abutments built along the east and west boundaries of the streets. The north rail of the appellee's north track,

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from Willow avenue to Austin avenue, runs parallel with and is about nine feet south of the south retaining wall of the Chicago & Northwestern Railway Company. Another ordinance was passed by the city of Chicago requiring appellee to elevate the plane of its tracks between Fifty-Second avenue and Austin avenue. This ordinance also provided that it should become effective from and after its passage, and provided that it should be null and void, unless appellee accepted its terms within 60 days after its passage. The appellee declined to accept this ordinance. Thereafter on November 22, 1909, the ordinance here involved was passed. The first section of the ordinance is as follows:

"Paragraph 1. That no person or corporation shall propel, or cause to be propelled, any single car or train of cars on any track or tracks situated on the surface of any street in the city of Chicago, across an intersecting street, when the track or tracks on which such single car or train of cars is or are propelled run parallel to the tracks of any steam railroad the tracks of which are elevated on an embankment and are carried over intersecting streets by a bridge or bridges, where the condition is such that any rail of said surface track is within fifteen (15) feet of the end of any abutment wall supporting said bridge or bridges.

"Paragraph 2. It is hereby declared to be a nuisance for any person or corporation to operate a single car or train of cars in violation of the foregoing paragraph."

The second section provides for a fine of not less than \$5 nor more than \$25 for each violation of the ordinance, and provides further that every single car or train of cars operated in violation of the ordinance shall be deemed a separate offense. It was admitted that if the ordinance was held valid there had been 304 violations of the same, and that judgment should be entered accordingly. On a hearing the municipal court of Chicago entered judgment for the defendant, and the case is brought to this court upon a certificate of the trial judge that it is a case where the validity of a municipal ordinance is involved, and that in his opinion public interest requires that an appeal be allowed directly on this court.

The contention of appellee in the court below, and its contention here, is that as to it this ordinance is invalid, because it impairs the obligation of the contract between it and the town of Cicero; that it deprives it of property without compensation, and is not a valid exercise of the police power of the city. Appellant contends, on the other hand, that the ordinance on which the suit is founded in effect requires track elevation; that it is neither unreasonable nor unconstitutional, and is one which the city had authority to pass.

This ordinance is in no sense one requiring track elevation.

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It does not pretend to permit the separation of the grade of the railroad tracks from the grade of the street, either by elevating or depressing the roadbed and tracks of the railroad. It provides simply for the removal of the tracks of any railroad company which are lying parallel with the tracks of any elevated steam road and within 15 feet of the end of any abutment wall supporting the bridge or bridges which carry the elevated tracks over any intersecting street. So far as the terms of this ordinance alone are concerned, track elevation on the part of appellee is not contemplated or permitted.

Appellant urges that appellee can avoid the destruction of its north track under this ordinance by complying with one of the ordinances heretofore passed, requiring appellee to elevate its tracks between Fifty-Second and Austin avenues, and refers to those ordinances as though the same were still in force and effect. Each of those ordinances, by express terms, provided that it would become operative only upon the acceptance of its terms by appellee within a specified time, and, in case appellee should fail to so accept it, that it would become null and void. As appellee declined in each instance to accept the terms of these ordinances, they never became effective, and appellee is in the same position toward the city of Chicago as though no such elevation ordinances had ever been passed.

Under the ordinance passed by the town of Cicero, the Cicero & Harlem Railroad Company was granted the right to construct a railroad, consisting of two tracks, from Fifty-Second avenue to Harlem avenue over a specified portion of the streets indicated. This ordinance provided that that company should operate a surface railroad under the grant, and specified the manner in which its tracks should cross the intersecting streets and the condition in which such crossings, including the grade of the street and the pavement, should be left after the building of the road had been completed. The road was built under this ordinance, and was afterwards sold to the appellee for a large sum of money, and has been operated as a double-track surface railroad since the time of its completion. The evidence shows that appellee runs 296 trains daily to Austin avenue, and that these trains carry 50,000 passengers. There was no dispute as to any fact. The evidence further discloses that the removal of the north track to a distance of 15 feet from the abutment of the bridges over the eight intersecting streets between Fifty-Second and Austin avenues, which abutments are on the north line of appellee's right of way of 32 feet, would leave but 17 feet for appellee's use, and that two tracks could not be used in that space. To comply with this ordinance, appellee would be limited to one track for the operation of its road between Fifty-Second and Austin avenues, which it is not denied would seriously impair the operation of the road and its revenue.

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The contention of appellant is that the conditions existing at the eight street crossings between Fifty-Second and Austin avenues are so dangerous that the passage and enforcement of this ordinance is a proper exercise of its police power to insure the safety of the public. It is shown by the evidence that at each of the street crossings in question appellee has voluntarily installed and maintains gates, at which signal bells are rung automatically on approach of trains and lights put on, which continue to burn while the bells are ringing. A flag is also displayed at the time, which indicates whether the gate is up or down. These gates are located between the abutments and the north track of appellee, and are about three feet from the retaining wall and abutments. The arms of the gates, when lowered, extend across the full width of the street and the sidewalk. During four hours of each day, which are referred to as rush hours (two hours in the morning and two hours in the evening), trains are run over this territory every three minutes and at times at the rate of one every minute and a half. During the time that these conditions have existed at the eight street crossings in question, since the elevation of the tracks of the Chicago & Northwestern Railway Company, but two accidents are shown to have occurred at any of these crossings—one to a policeman on duty at one of the crossings, and one in which a milk wagon was struck. The mere fact that these crossings may be dangerous is not sufficient to authorize the city to deprive appellee of its right to use South boulevard and Lake street under its contract originally made with the town of Cicero. That ordinance granted to the assignor of appellee permission and authority to lay its tracks on the north 32 feet of South boulevard and Lake street, and to use them for the purposes for which they are being used.

[1] The privilege of the use of the public streets of the city or town, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for, if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a valid and binding contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust. *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *City of Belleville v. Citizens' Horse Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *People v. Blocki*, 203 Ill. 363, 67 N. E. 809.

[2. 3] This ordinance is, in effect, an attempt to revoke the license of appellee to use the street under the terms of the ordinance giving it that permission. The grant by the town of Cicero, and by which the city of Chicago is bound, was accepted and acted upon in a substantial manner by appellee and its assignor, and now constitutes a contract binding and obligatory upon appellant and

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appellee, which cannot be arbitrarily broken. The city of Chicago undoubtedly has the right, in the exercise of its police power, to regulate the use by appellee of its tracks and cars in a reasonable manner, but it cannot, under the pretense of regulation, deprive the appellee of its property or of any of its essential rights and privileges acquired under the contract with the town of Cicero. *City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135; *City of Belleville v. Turnpike Co.*, 234 Ill. 428, 84 N. E. 1049, 17 L. R. A. (N. S.) 1071; *Venner v. Chicago City Railway Co.*, 246 Ill. 170, 92 N. E. 643.

[4] It cannot be contended that by this ordinance appellant is attempting in any manner to regulate the use by appellee of its tracks and cars, and, indeed, counsel for appellant frankly admit that such is not the purpose of the ordinance, and insist that the ordinance is one requiring elevation. As has been pointed out, this ordinance cannot be regarded in any sense as an elevation ordinance, and, as its only purpose is to require the removal of the tracks of such railroad companies as are situated as is appellee, it is such an infringement upon the rights of appellee as renders the ordinance invalid as to it. The right of the city, by the exercise of its police power, to regulate any business or the use of any property does not give the power to prohibit the conducting of a lawful business, or to suppress entirely the use of property. *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230.

[5] It is contended by appellant that it has the power to declare such a situation as is here presented to be a nuisance and to suppress the same. Appellee is conducting its business in accordance with the grant made originally by the town of Cicero. It constructed its road by authority of law, and is operating it, under the terms of the grant, for the accommodation of the public. The city cannot, by a mere declaration, show the operation of the appellee's road through the territory in question to be a nuisance, and subject its tracks to removal. The public welfare demands that there should not be a discontinuance of the operation of an authorized railroad. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *Chicago & Eastern Illinois Railroad Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341.

Appellant complains of the refusal of the court to hold as law 57 propositions submitted by it, and of the action of the court in holding as law 18 propositions submitted by appellee. Many of the propositions submitted by appellant were abstract propositions of law and were correct, but were not applicable to the questions involved here. We have not made a critical examination of all these propositions of law as to the refusal or holding of which error has been assigned, as the judgment of the court

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below was clearly proper, even though there may have been error in the action of the court in passing upon some of the propositions submitted.

For the reasons stated, the ordinance in question, as applied to the tracks of appellee from Fifty-Second avenue to Austin avenue, in the city of Chicago, is invalid, and the judgment of the municipal court is affirmed.

Judgment affirmed.

YOUNGSTOWN PARK & FALLS ST. RY. CO. v. KESSLER.

(Supreme Court of Ohio, April 18, 1911.)

[95 N. E. Rep. 509.]

Physicians and Surgeons—Contracts—Performance of Medical Services.*—A contract to perform medical or surgical services by a corporation organized for the purpose of constructing, owning, and operating a street railway is not only ultra vires, but is in direct conflict with the laws of this state regulating the practice of medicine and surgery, and is therefore void.

Physicians and Surgeons—Liability for Malpractice.†—Such a corporation cannot be directly liable for damages for malpractice of medicine or surgery.

Physicians and Surgeons—Contract to Furnish Medical Aid—Breach—Liability.†—Such corporation may make a valid contract to furnish or pay for medical aid and attention to one injured upon its cars or tracks; and an action against it for damages for a breach of such contract may be maintained.

Physicians and Surgeons—Contract for Medical Services—Malpractice—Breach.—A petition that avers the making of such contract, the employment by the company of a surgeon in pursuance of such contract, and malpractice on the part of such surgeon resulting in damages to the plaintiff, but which does not aver that the person so employed was not regularly admitted to practice medicine and surgery in Ohio, or that he was incompetent and the com-

*For the authorities in this series on the subject of the ultra vires acts and contracts of railroad companies, see first foot-note of National Car Ad. Co. v. Louisville & N. R. Co. (Va.), 33 R. R. R. 179, 56 Am. & Eng. R. Cas., N. S., 179; last foot-note of Blume v. Southern R. Co. (S. C.), 36 R. R. R. 603, 59 Am. & Eng. R. Cas., N. S., 603.

†For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see foot-note of Texas Cent. R. Co. v. Zumwalt (Tex.), 38 R. R. R. 468, 61 Am. & Eng. R. Cas., N. S., 468.

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pany knew, or had means of knowing of his incompetency, or that it was otherwise guilty of negligence or carelessness in selecting him to perform such service, does not state a cause of action.

(Syllabus by the Court.)

Error to Circuit Court, Mahoning County.

Action by one Kessler against the Youngstown Park & Falls Street Railway Company. Judgment for defendant in the common pleas was reversed in the circuit court, and it brings error. Reversed.

On the 1st day of July, 1905, the defendant in error filed her petition in the common pleas court of Mahoning county, seeking to recover a judgment for damages against the plaintiff in error, the Youngstown Park & Falls Street Railway Company, to which petition this plaintiff in error filed a demurrer, which demurrer was sustained. The defendant in error then filed an amended petition, to which a demurrer also was filed, and later the defendant took leave to file a second amended petition, and on the 24th day of July, 1907, did file such second amended petition, averring, in substance, that on the 22d day of July, 1899, she was a passenger on one of the cars of the defendant company; that in alighting therefrom she received certain injuries; that "the defendant sent its surgeon to treat her for the injuries so received, and insisted upon furnishing the treatment necessary in and about the injuries so received, and that in assuming such treatment said defendant contracted and agreed with plaintiff to furnish said surgical and medical attention and advice as her injuries demanded, and to correctly diagnose and treat her injuries with diligence, care, and ordinary skill and for such length of time as would be necessary to make a complete recovery, to all of which plaintiff assented and defendant entered on the performance of its contract with plaintiff." She then avers that the diagnosis then made by the surgeon was incorrect; that the treatment given her was not the proper treatment for the nature of the injuries she had received; that the advice given her was not proper; that she has followed this advice faithfully, but, instead of recovering from her injuries, she has become a confirmed cripple; that neither medicine nor surgical treatment has been given her within the year next preceding the bringing of this action, but that plaintiff has been at all times following the advice of the surgeon and attempting to use her limb as directed by him to do, and relying upon his advice that by using the same it would eventually become well and sound, all of which has now proven to be without avail, and she avers that this was only for the purpose of getting rid of, and avoiding the carrying out of, the contract made with the company. She also avers with some particularity the nature of the injury actually received by her, and the character of the

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treatment given her, and the extent of the injuries and damage she has suffered by reason of such improper diagnosis and incorrect advice and treatment and asks damages in the sum of \$10,000.

To this second amended petition the defendant filed a general demurrer, which demurrer was sustained, and, plaintiff not desiring further to amend, her petition was dismissed, with costs, and error prosecuted by her in the circuit court of Mahoning county. That court reversed the judgment of the common pleas court and remanded the cause with directions to the common pleas court to overrule the demurrer. This proceeding in error is now brought in this court to reverse the judgment of the circuit court.

Norris, Jackson & Rose and Arrel, Wilson & Harrington, for plaintiff in error.

S. L. Clark, for defendant in error.

DONAHUE, J. (after stating the facts as above.) It is contended on the part of counsel for plaintiff in error that by the provisions of section 4983, Revised Statutes, the limitation of the time in which an action for malpractice may be brought is one year from the time of the commission of the wrong complained of; that this second amended petition shows upon its face that the diagnosis was made, and the treatment and advice given plaintiff, almost six years prior to the time of bringing this action, and that the action being barred by the statute, and the averments of the pleading clearly showing that fact, that the demurrer to the second amended petition was properly sustained by the common pleas court.

[1] It is sufficient to say with reference to this contention that a railroad company cannot be guilty of malpractice. It is not authorized to practice medicine or surgery, and therefore any contract it might make to do so would be not only ultra vires, but in direct conflict with the laws of this state regulating the practice of medicine and surgery. Therefore the statute limiting the time in which actions for damages for malpractice may be brought has no application to this suit.

[2] No such action will lie against a railroad company, and, if that is the cause of action stated in this second amended petition, then it would be vulnerable to a demurrer, not only because of the statute of limitation, but also because it does not aver facts sufficient to constitute a cause of action.

It probably does appear from a reading of this second amended petition that the pleader intended to state a cause of action for damages for malpractice, but the intention of the pleader does not necessarily control. If there are sufficient facts pleaded to constitute any cause of action, it is not important whether the pleader intended to state that particular cause of action or not.

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[3] If this petition states a cause of action, it must be one for a breach of contract to furnish such medical and surgical aid and attention to the plaintiff as she might require. This second amended petition does aver such a contract, but it does not clearly appear whether the pleader intended to aver an express contract, or a contract implied from the circumstances of the case and conduct of the parties. It does not aver any consideration for such a contract. So far as this pleading is concerned, the railroad company was a mere intermeddler. It sent its surgeon there without any request on her part for his services, or without any reason for its doing so, unless the fact that the plaintiff had been injured while alighting from the defendant's car be taken as a sufficient reason for its having so done. There is no averment that the defendant was negligent in the management and operation of its cars or had negligently or carelessly or wrongfully caused the injury to the plaintiff. However, if it be conceded that sufficient facts are pleaded to show a valid contract between the plaintiff and the defendant by the terms of which the defendant undertook to furnish to the plaintiff the services of a physician and surgeon to treat her for the injuries she received while alighting from its car, it also fully appears in this petition that it did furnish her a physician and surgeon for that purpose, and that he did examine her injuries, diagnose her case, and give her treatment and advice. Her claim is not that the railroad company failed to furnish a physician and surgeon, as by the terms of its contract it had agreed and undertaken to do, but that it failed to furnish a surgeon sufficiently skilled and competent to treat her injuries.

It is not the law that one who contracts to furnish or pay for medical or surgical aid and attention to another is liable at all events for the mistakes or incompetency of the physician or surgeon he may employ for that purpose. There must be some neglect or carelessness or misconduct on his part in the performance of his obligations arising under such contract. If he act in good faith and with reasonable care in the selection of the physician or surgeon, and has no knowledge of the incompetency or lack of skill or want of ability on the part of the person employed but selects one of good standing in his profession, one authorized under the laws of this state to practice medicine and surgery, he has filled the full measure of his contract, and cannot be held liable in damages for any want of skill or malpractice on the part of the physician or surgeon employed.

[4] There is no averment in this petition that the surgeon employed by this defendant railroad company was not in good standing in his profession; that he was not authorized to practice surgery, or that he was grossly incompetent and that the defendant had knowledge of his incompetency, or in the exercise of due care could have obtained such knowledge; that the

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plaintiff did not know and had not equal means of knowing the competency and ability of the person employed or that the company was guilty of any neglect or any carelessness in selecting this particular surgeon to perform this service. Therefore, if this second amended petition does aver sufficient facts to show a valid contract by the terms of which this company agreed and undertook to furnish medical and surgical aid to this plaintiff it wholly fails to show any breach of this contract on the part of the company or any such careless or negligent performance of its obligations arising under such contract as would make it liable to plaintiff for the damages which she may have sustained by reason of the incompetency, want of skill or malpractice on the part of the surgeon so employed.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

Judgment reversed.

SPEAR, C. J., and PRICE and JOHNSON, JJ., concur. DAVIS, J., not present at the argument and not voting. SHAUCK, J., concurs in the judgment and in the first and fourth propositions of the syllabus.

BOOZ v. TEXAS & P. RY. CO.

(Supreme Court of Illinois, June 20, 1911.)

[95 N. E. Rep. 460.]

Constitutional Law—Due Process of Law—Jurisdiction.—A question of the jurisdiction of the court to render a judgment is one of due process of law; and hence, if the defendant is not amenable to process within the state, judgment against it is not rendered in pursuance of due process of law, guaranteed by the Constitution.

Corporations—Foreign Corporations—Process—Service.—Under Practice Act (Hurd's Rev. St. 1909, c. 110) § 8, providing that jurisdiction may be obtained over a corporation by service of a copy of the writ on any clerk or agent of the corporation, if the president cannot be found within the county, service may be had on a foreign as well as a domestic corporation, provided the foreign corporation is present within the state and has a resident agent on whom process may be served; a business corporation being regarded as constructively present within any state where it has property and carries on its operations by means of agents, though its domicile is in another state.

*Booz v. Texas & P. Ry. Co***~~Railroads—Foreign Corporations—Actions—Process—Service.*—~~**

Where a foreign railroad corporation had no property or agent authorized to make a contract for or bind it in any way within the state, it was not subject to suit in Illinois by service on a mere soliciting agent.

Error to Municipal Court of Chicago; William N. Gemmill, Judge.

Action by John T. Booz against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jeffery, Ott & Campbell (*Charles V. Clark*, of counsel), for plaintiff in error.

CARTWRIGHT, J. John T. Booz, defendant in error, sued the Texas & Pacific Railway Company, plaintiff in error, for the value of an overcoat alleged to have been lost by him on February 25, 1909, through negligence of plaintiff in error while he was a passenger on one of its trains between two stations in Louisiana. Summons was returned by a bailiff served on George W. Pither, chief clerk and agent of defendant. A limited appearance was entered by attorneys for defendant for the sole purpose of questioning the jurisdiction of the court, and a motion was made to quash and set aside the return. The facts upon which the motion was decided are as follows:

The defendant is a railroad corporation existing under the laws of the United States and the state of Texas, with its principal office in Dallas, Tex. Its lines of road are in Texas and Louisiana, and it has never owned, leased, or operated any road, nor had any principal office, in this state, and the cause of action did not arise in this state. George W. Pither is an employee of W. C. Staley, a soliciting freight agent, and Ellis Farnsworth, a soliciting passenger agent, of several foreign railroad companies, including the defendant. The defendant and four other railroad companies operating railroads outside of this state in the same region jointly maintain three offices in the city of Chicago and jointly pay the office expenses and salaries of the employees; the defendant paying its share of the rental and salaries. All the employees and the business are under the control of Edward B. Boyd, who is not an officer of any of the corporations, but is hired by the railroads jointly, and is called an assistant to the vice president. The only business transacted through this office or by the employees is soliciting shipments by way of

*For the authorities in this series on the question where actions against railroads may be brought and upon whom in such actions summons may be served, see foot-note of *Ritchie v. Illinois Cent. R. Co.* (Neb.), 38 R. R. R. 600, 61 Am. & Eng. R. Cas., N. S., 600.

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the lines of these corporations from large manufacturing and industrial concerns, and endeavoring to persuade prospective shippers or consignees of freight to route shipments over the lines of said corporations, and soliciting passenger business by persuading passengers to purchase their tickets so they will pass over some one or more of the lines of said corporations, all of which are outside of this state. That is and has been the only business transacted in this state for the defendant, and neither Boyd nor any of the employees under him have any power to make a contract for the defendant, to issue any bill of lading, sell any ticket, receive any money, or make any freight or passenger contract. Boyd and his subordinates devote only a portion of their time to the services of the defendant, and the sole duties performed by them are the solicitation of freight and passenger business.

The court overruled the motion to quash the return, and the defendant elected to stand by its motion, and declined to enter another or further appearance. The court thereupon heard the evidence for the plaintiff, found the issues in his favor, assessed his damages at \$50, and entered judgment for that amount. The defendant excepted to the judgment, and sued out a writ of error from this court to obtain a review of the record. By the assignment of errors it is alleged that the judgment violated the Constitutions of this state and the United States by depriving the defendant of its property without due process of law.

[1, 2] A question of the jurisdiction of a court to render a judgment is one of due process of law, and if the defendant was not amenable to service of process within this state, the judgment was not rendered in pursuance of the due process of law guaranteed by our Constitution. Section 8 of the practice act (Hurd's Rev. St. 1909, c. 110) provides the method for acquiring jurisdiction of a corporation, which may be done by leaving a copy with any clerk or agent of the corporation, if the president cannot be found within the county. The section is not confined, in its terms, to domestic corporations, and if a foreign corporation is present within this state, and has an agent here, process may be served upon it. A business corporation is constructively present in any state where it has property and carries on its operations by means of agents, although the domicile of the corporation is in another state. *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308. If a foreign corporation does business in the state through agents, it may be sued there by obtaining service on the agent. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Western Union Telegraph Co. v. Pleasants*, 46 Ala. 641. If it avails itself of the privilege of doing business in a state whose laws authorize it to be sued there by service of process upon an

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agent, its assent to such service will be implied (13 Am. & Eng. Ency. of Law [2d Ed.] 895); but the foreign corporation must have entered the domestic state for the purpose of carrying on its business there (19 Cyc. 1328).

In *Mineral Point Railroad Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124, a Wisconsin corporation had built and operated a railroad from the line between Wisconsin and this state to Warren, in Jo Daviess county, and it was held the foreign corporation, having property in this state and doing business here, could be served with process by delivering a copy to its conductor; the president not being within the state. In *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 62 N. E. 317, a foreign corporation had extended its business into this state and transacted such business here through an agent, who occupied an office maintained by the corporation, and who was advertised on the office door as its Western agent, and the corporation had written letters to its customers referring them to the agent for the adjustment of its business affairs. It was held not improper to instruct the jury that a corporation so acting was bound, as principal, to those dealing with such person, whether the agency in fact existed or not. It was not implied, however, that any representative capacity would be sufficient to constitute a representative an agent, and attention was called to the fact that in other instructions the court advised the jury that a salesman who sells goods for a corporation on commission and stands in no other relation to the corporation is not an agent as contemplated by the statute, and that service of process on such a salesman would not confer jurisdiction on the corporation. Doing business within this state means the transaction of the ordinary business in which the corporation is engaged, by the exercise of some of its charter powers. *Alpena Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480. In *Midland Pacific Railway Co. v. McDermid*, 91 Ill. 170, the defendant was a corporation of the state of Nebraska, and the summons was served on its general superintendent temporarily in this state and passing through it, and the defendant did not do any business nor have any property in this state. The service was within the literal language of the practice act; but it was held that, there being no local agent in this state, there was no one upon whom service of process could be lawfully had.

[3] The return of the bailiff was not conclusive of the fact that George W. Pither was the agent of the defendant, and defendant was at liberty to dispute the truth of the return. The conclusion as to that fact depended upon whether the defendant had extended its business into this state, so as to be constructively present here, and was transacting that business through George W. Pither, as its agent. The defendant, being a foreign corporation, could only be served in this state if it was doing business

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here, and no one could be an agent of the defendant unless he had power to represent it in the transaction of some part of the business contemplated by its charter. There was no one in this state who had power to make any contract or bind the defendant in any way, and the mere solicitation of business by persons who have no other authority is not doing business within this state. Neither Boyd nor any one under him had authority to sell a ticket, issue a bill of lading, or make a contract for the defendant, and they were no more agents of the defendant than other railroad companies selling tickets or issuing bills of lading under which the passengers or freight would pass over the road of the defendant in Texas or Louisiana. The decisions of the courts are that mere solicitors of business are not agents, within the meaning of the statute. *Wall v. Chesapeake & Ohio Railway Co.*, 95 Fed. 398, 37 C. C. A. 129; *Fairbank Co. v. C., N. O. & T. P. Ry. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; *Green v. Chicago, Burlington & Quincy Railroad Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *North Wisconsin Cattle Co. v. Oregon Short Line Railroad Co.*, 105 Minn. 198, 117 N. W. 391.

The court erred in refusing to quash the return, and the subsequent proceedings were void for want of jurisdiction over the defendant. The judgment is reversed.

Judgment reversed.

CLINE v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of West Virginia, May 16, 1911. Rehearing Denied June 17, 1911.)

[71 S. E. Rep. 705.]

Waters and Water Courses—Railroad Embankment—Change of Channel—Liability.*—If a railroad company make a fill or embankment along a stream, which changes the channel and current, and thus cause land of a riparian owner across the stream to be washed away, it is liable for the damage, and is not exempt from liability by the authority conferred on it by the state to build its road.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County.

Action by James J. Cline against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*See first foot-note of *St. Louis, etc., R. Co. v. Mackey (Ark.)*, 37 R. R. R. 279, 60 Am. & Eng. R. Cas., N. S., 279; first foot-note of *Delashmutt v. Chicago, etc., R. Co. (Iowa)*, 37 R. R. R. 15, 60 Am. & Eng. R. Cas., N. S., 15; last foot-note of *Southern Ry. Co. v. Lewis (Ala.)*, 35 R. R. R. 778, 58 Am. & Eng. R. Cas., N. S., 778.

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Wyndham Stokes and J. Graham Sale, for plaintiff in error.
Cook & Howard, for defendant in error.

BRANNON, J. The Norfolk & Western Railway Company constructed two fills or embankments on one side of Tug river for a second track, invading the river. One of these fills was just across the river from a tract of land owned by James J. Cline. In 1907 and again in 1908 high water came in Tug river and washed away a considerable quantity of Cline's land and the trees thereon. Cline sued the railway company and obtained a verdict and judgment for \$150, and the company brought this writ of error.

One defense of the action presented for our consideration is that the railway company built these fills on its own right of way, and in doing so did the work in the most approved manner, and was not guilty of any negligence in construction, and therefore, though damage came to Cline there could be no recovery. Such a legal proposition cannot be sustained. There seems some confusion yet prevailing touching this matter so well established in law that it seems hardly necessary to restate it. When the Constitution provided that "private property shall not be taken for public use without just compensation," the law was that a railroad company or other corporation having authority from the Legislature was not liable when land was not actually taken, or so damaged that it amounted to that, for damages to the land merely consequential from the work. *Spencer v. Railroad*, 23 W. Va. 413, 427, 4 Am. & Eng. Ann. Cas. 1175, 1185; 15 Cyc. 653; 10 Am. & Eng. Ency. L. 1103. But if the work was done negligently, if the power was not prudently and carefully exercised, damages could be recovered. *Taylor v. Railroad*, 33 W. Va. 39, 10 S. E. 29. Some cases held that damages could be recovered even under such provision using only the word "taken"; that a grant of authority from the Legislature could not exempt for property merely damaged, but not taken. *Trenton Co. v. Raff*, 36 N. J. Law, 335. But this has become an immaterial question, because our Constitution of 1872 (article 3, § 9) inserted the word "damaged," making it read: "Private property shall not be taken or damaged for public use without just compensation." Therefore, no matter whether the property is actually physically taken, or so badly damaged as to amount to a taking, or be merely damaged to a substantial, not speculative, extent, damages may be recovered, and the legislative authority for the work matters not. *Pickens v. Coal R. Co.*, 66 W. Va. 10, 65 S. E. 865; *Guina v. Railroad*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Watson v. Fairmont*, 49 W. Va. 528, 39 S. E. 193. This provision of our Constitution came from Illinois, and construing that Constitution the

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United States Supreme Court held in *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; that: "Under the provision in the state of Illinois adopted in 1870 that 'private property shall not be taken or damaged for public use without just compensation,' a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damages be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value." So, if damages came to Cline from those fills, he is entitled to recover.

Another ground of defense is that in fact the fills or embankments did not cause the damage. On this question the evidence is conflicting. There is a large amount of evidence going to show that though there had been in 1901 and 1902 higher rises in Tug river, yet they did not wash the land away, and that these fills changed the current of the stream from the railway side of the river to the other side and threw the current against Cline's land, and that the washing away of the land was directly attributable to these fills. There is some evidence to the contrary. The question was one of fact for the jury. We shall not detail the evidence. The verdict and the action of the circuit court must be in this respect final. Else what efficacy has a verdict upon conflicting oral evidence?

It is complained that the court allowed witnesses to express an opinion that the damage to Cline's land came from those fills. The witnesses giving such opinion were well acquainted with the stream and the fills had been acquainted with the stream for years before, and spoke from observation of river and fills. Opinion evidence is not always to be rejected. When it is based on practical and actual observation of things, which cannot be brought into court to be seen by the jury, it is admissible. This matter had been often discussed. *Walker v. Strosnider*, 67 W. Va. 39, pt. 17, 67 S. E. 1087; *Kunst v. Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201.

Complaint is made of the refusal of instructions. Some of them are based on the proposition of law above stated, and are not sound in that respect. One asserts that it was the duty of Cline to build a defense of his land against the water, and thus prevent damage. Plainly this cannot be so. The work changed the channel and current, and Cline as a riparian owner was entitled to have the river as by nature it was. We need not incorporate those instructions, as the case does not go back for retail, and as they involve no principle of law not above stated. We need not further discuss the case.

Judgment affirmed.

KANSAS CITY SOUTHERN RY. CO. *v.* TERMIER *et al.*

(Supreme Court of Kansas, June 10, 1911.)

[116 Pac. Rep. 256.]

Eminent Domain—Award—Appeal—Evidence of Damages.—The mere fact that commissioners, in laying out a right of way for a railroad had allowed a certain item of damages, affords no evidence, on the trial of an appeal from their award, that such damages had in fact been sustained.

(Syllabus by the Court.)

Appeal from District Court, Wyandotte County.

Condemnation proceedings by the Kansas City Southern Railway Company against J. C. Termier and others. From the award, the Railway Company appeals. Reversed.

O. L. Miller, Cyrus Crane, and C. A. Miller, for appellant. *Hale & Dean and Richard J. Higgins*, for appellees.

BENSON, J. On the trial of an appeal from an award of damages in taking land for a right of way, the jury assessed damages for the value of the land actually taken at a certain sum, and damages to the remainder of the tract at \$300. The railway company complains only of the last-named item, basing their complaint upon a statement in the abstract "that there was no evidence which tended to show the damages to the land not taken." In a counter abstract the appellees give the testimony of witnesses upon which they rely to support the finding. The witnesses were two of the commissioners who made the original award, who explained such award, giving the items thereof, showing that they had allowed damages to land not taken. This, however, appeared from the record of the proceedings.

Such appeals are tried the same as appeals taken from judgments of justices of the peace. Gen. Stat. 1909, § 1805. It will not be claimed that, on the trial of an appeal from the judgment of a justice of the peace, the judgment appealed from is competent evidence of the plaintiff's claim. The witnesses were not asked to give their opinions of the extent of the damages, but only testified to the fact that they allowed damages. This proved nothing, and the appellant's motion to reduce the judgment, by striking out the item complained of, ought to have been sustained.

The order overruling the motion is reversed, and the cause is remanded, with directions to sustain the motion and to reduce the judgment accordingly. All the Justices concurring.

LEMANN Co., Limited, *v.* TEXAS & P. RY. Co.

(Supreme Court of Louisiana, May 8, 1911. Rehearing Denied June 26, 1911.)

[55 So. Rep. 684.]

Evidence—Circumstantial Evidence—Sufficiency.—A fact may be established by circumstantial, as well as by direct and positive, evidence.

Railroads—Fires Set by Locomotives—Evidence.*—Evidence that the fire started up (1) immediately or very soon after the passing of the train, (2) that there was no fire on the premises or vicinity of the premises before, and (3) there was no other apparent cause for a fire is sufficient to warrant an inference of fact that the fire was emitted from the railway company's engine.

(Syllabus by the Court.)

Appeal from Twenty-Seventh Judicial District Court, Parish of Ascension; Paul Leche, Judge.

Action by the Lemann Company, Limited, against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Marks, Wortham & Le Blanc (*Howe, Fenner, Spencer & Cocke* and *Esmond Phelps*, of counsel), for appellant.

Pugh & Lemann, for appellee.

SOMMERVILLE, J. Plaintiff sues defendant for loss sustained by fire on two of its plantations, Peytavin and Souvenir, in Ascension parish. The evidence shows that both fires occurred on two Sunday mornings; when the buildings, of frame, were unoccupied and closed, and when no one was in or around them. That one of said buildings was about 50 feet, and the other about 150 feet, from the track of defendant. Plaintiff alleges that the loss was due to fault and negligence on the part of defendant, its employees, agents, etc., and it asks for judgment for \$5,825.77 against defendant.

Defendant answers that its engines did not set fire to plaintiff's buildings; that it was not at fault; that its engines, on the two occasions referred to in plaintiff's petition, had been examined just prior, and immediately subsequent, to the fires, and found to be in good order, and equipped with spark arresters, in perfect condition.

*For the authorities in this series on the question whether the fact that a fire was started from sparks from a locomotive may be established by circumstantial evidence, see foot-note of *Jensen v. South Dakota Cent. Ry. Co.* (S. Dak.), 38 R. R. R. 155, 61 Am. & Eng. R. Cas., N. S., 155; second head-note of *St. Louis, etc., R. Co. v. Shannon* (Okla.), 36 R. R. R. 74, 59 Am. & Eng. R. Cas., N. S., 74.

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The case presents a question of fact only, and a jury has found in favor of the plaintiff, and the trial judge has approved the verdict.

The testimony of plaintiff is contradicted by that of defendant. Witnesses for the latter testify that the spark arresters in the smokestacks of defendant's engines were in good order and condition, and sparks, sufficiently large to carry and communicate fire to the buildings some 50 to 150 feet distant, could not be emitted therefrom. Witnesses for plaintiff testify that sparks were being constantly emitted from defendant's locomotives; were emitted on the morning when the fire took place on Pevtavin plantation; that many fires had been set out by defendant's engines and much property destroyed thereby; and that some of the buildings along the roadway of defendant had been roofed with iron sheeting to protect them from fire from passing engines.

The evidence upon the disputed points, being thus in conflict, the question has been properly submitted to and solved by the jury.

A re-examination of the evidence convinces us that the finding of the jury is correct. The preponderance of the evidence is in favor of plaintiff. We remember, in passing upon the sufficiency of the evidence offered, that each case must depend upon the circumstances disclosed by the evidence therein.

[2] It is laid down as a rule that evidence that the fire started up (1) immediately or very soon after the passing of the train, (2) that there was no fire on the premises or vicinity of the premises before, and (3) that there was no apparent cause for the fire is sufficient to warrant an inference of fact that the fire was emitted from the railway company's passing engine. *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221; *Abbot v. Gore*, 74 Wis. 509, 43 N. W. 365; *G. C. & S. F. Ry. Co. v. Blackenever-Stevens-Jackson Co.*, 48 Tex. Civ. App. 443, 106 S. W. 1140.

The fires under consideration were started 50 and 150 feet, respectively, from where defendant's locomotives had passed, and on Pevtavin the locomotive had been engaged in switching only a short time before, emitting sparks. On Souvenir, the train had passed only a very short while before the fire. There had been no fire on the two premises of plaintiff on the two mornings of the fires: there was but one apparent cause for the fires. The jury found that there was negligence on the part of defendant and its employees, and that the sparks from defendant's locomotives had caused these fires. We are not in a position to say that there was no evidence of negligence, and that the jury erred. It found that sparks, sufficient in size to ignite the buildings burned, had been frequently emitted by the locomotives of defendant. We concur in this finding. The jury may

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have also found from the evidence in the record that the spark arresters were in bad order, or that the larger live cinders had been blown or forced through the arresters.

Plaintiff having sustained the burden of proof, and made its case certain:

The judgment is affirmed.

BALTIMORE & O. R. CO. *v.* STATE to Use of WELCH.

(Court of Appeals of Maryland, Jan. 11, 1911.)

[80 Atl. Rep. 170.]

Railroads—Injuries to Trespassers—Streets—Use of Track—Evidence.—Where a street ended at, but did not cross, defendant's railroad right of way at the point where decedent was struck and killed, and there was no proof of any legalized public crossing of the tracks at or near such point, the court erred in an action for decedent's death in admitting evidence that persons had long been in the habit of walking along the street and crossing the tracks at that point.

Railroads—Persons on Track—Trespassers—Injuries—Acquiescence.*—Mere acquiescence by a railroad company in the use of its track by trespassers does not confer any right or license to use the tracks, nor create any obligation for the special protection, other than to use reasonable care to prevent injury after the trespasser's peril has been discovered.

Railroads—Injuries to Trespassers—Evidence—City Ordinance.—Baltimore City Code 1906, art. 30, § 14, providing that, where a locomotive is used within the city limits, a man shall ride on the front when going forward, and on the tender when going backward, not more than 12 inches from the bed of the road, etc., having been held practically obsolete and inoperative, should not have been admitted in an action for the death of a child, trespassing on the track within the city, by being run over by the engine tender moving backwards and carrying no lookout as required.

Trial—Dismissal—Waiver.—Error in denying a prayer to dismiss the case at the close of plaintiff's evidence was waived by the introduction of evidence by the defendant, since thereafter plaintiff's right to recover depended, not alone on the evidence introduced by her, but on defendant's proof as well.

Witnesses—Contradiction—Foundation.—A witness may not be discredited by proof of former contradicted statements, unless a foundation for such proof has been laid by interrogating the wit-

*For the authorities in this series on the question what does and does not constitute a license to travel on or cross railroad tracks, see foot-note of *Schmidt v. Pennsylvania R. R.* (C. C. A.), 38 R. R. 645, 61 Am. & Eng. R. Cas., N. S., 645.

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ness as to the time, place, and person to whom the alleged contradicted statements were made, and the witness asked whether or not he had said or declared that which was intended to be proved.

Railroads—Death of Trespasser—Discovered Peril—Question for Jury.—In an action against a railroad company for death of a child trespassing on its tracks, evidence held to require submission of the case to the jury on the theory that defendant's servants failed to exercise ordinary care to prevent running over deceased after they saw him on the track, or heard his cries just before he was struck.

Railroads—Death of Trespasser—Discovered Peril—Evidence.—While, in an action for the death of a trespasser by being run over by an engine tender, plaintiff was bound to prove that defendant's servants were made "aware" of deceased's presence on the track ahead of them in a position of peril in time for such servants to have avoided injury to him, she was not bound to prove that the fact of the servants' knowledge of decedent's peril by their own admission, but might establish it over their denial by any competent evidence sufficient to satisfy the jury.

Railroads—Trespassers—Injury to Trespassers—Duty to Look Out.†—Operatives of railroad train are not required to anticipate the presence of trespassers on the track, and are therefore not bound to keep a lookout for them or to guard in advance against the possible or probable result of their unexpected wrongful presence on the track; their responsibility arising only when they are made aware of the trespasser's presence and peril.

Railroads—Injury to Trespassers—Instruction.—Where, in an action against a railroad company for killing plaintiff's minor son while trespassing on defendant's tracks, there was evidence that his foot was caught in a switch, and that from that time until he was run over and killed he was screaming and yelling, a requested charge that the duty of defendant's servants to exercise care to protect him began only when they "saw" him in a situation of peril was properly refused, as eliminating their duty to exercise such care in case they "became aware" of his presence by hearing him scream.

Appeal from Superior Court of Baltimore City; George M. Sharp, Judge.

Action by the State, to the use of Emma A. Welch, against the Boston & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

†For the authorities in this series on the subject of the duties owed by trainmen to licensees and trespassers on railroad tracks before they are discovered, see last paragraph of foot-note of *Schmidt v. Pennsylvania R. R.* (C. C. A.), 38 R. R. R. 645, 61 Am. & Eng. R. Cas., N. S., 645; foot-note of *Covington, etc., Co. v. Marsh* (Ky.), 38 R. R. R. 196, 61 Am. & Eng. R. Cas., N. S., 196; last foot-note of *Chicago, etc., Ry. Co. v. Smith* (Ark.), 37 R. R. R. 51, 60 Am. & Eng. R. Cas., N. S., 51.

Baltimore & O. R. Co. v. State to Use of Welch

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, PATTISON, and URNER, JJ.

Allen S. Bowie and Duncan K. Brent, for appellant.

Linwood L. Clark, for appellee.

SCHMUCKER, J. The appeal in this case is from a judgment of the superior court of Baltimore city against the appellant company for damages for fatally injuring the son of the equitable appellee by one of its locomotives. It appears from the record that on the afternoon of Sunday, August 15, 1909, James H. Welch, a minor son of the equitable appellee, about 14 years old, was run over and fatally injured by the tender of a locomotive of the appellant, while it was backing along a switch on what is known as Wells street at or near the foot of Byrd street, in Baltimore city. The entire bed of what is called Wells street was then owned by the appellant, and occupied by its east and west bound main tracks and several switches. The boy was therefore at the time of his injury a trespasser upon the appellant's track, unless he was present there by virtue of some implied license or permission from it. The evidence both as to the details of the accident and the current uses of the locality of its occurrence are quite conflicting. Wells street runs east and west. The territory lying north of it in the vicinity of the accident comprises part of the improved portion of the city, and contains many houses of the plainer sort, such as are usually occupied by laboring people and factory operatives. The land lying south of the street at that point contains but few residences, and is practically unimproved, except by the appellant's roundhouse and coal chute and some factory buildings. Byrd street runs northerly from Wells street and at right angles to it, but does not intersect or cross it. South of Wells street, immediately opposite the foot of Byrd street, is situated the factory building of the National Enameling & Stamping Company, which ordinarily employs from 700 to 800 persons. The roundhouse, coal chute, and yards of the railroad company lie a short distance east from the factory of the Enameling & Stamping Company. The accident by which the appellee's son was injured occurred at a point almost opposite the foot of Byrd street on the track of a switch, running along the bed of Wells street from the appellant's roundhouse to its main tracks, and lying south of both of the main tracks. The witnesses for the defendant place this point further away from the line of Byrd street than those for the plaintiff. On the south of Wells street, about two squares east from the foot of Byrd street, there is a roundhouse of the appellant and also a coal chute from which the engine was backing along the switch toward the main track when it ran over the boy.

There is evidence in the record tending to prove that many

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of the operatives employed in the factory of the Enameling & Stamping Company and also other persons had for years past been in the habit when going to and from their work, of crossing the defendant's tracks on Wells street in the vicinity of the factory without hindrance or opposition, and that there were no signs or warning near the place forbidding such crossing. This evidence does not tend to show the existence of fixed or definite places of crossing, but rather tends to establish a habit of crossing the tracks at will whenever persons wished to go over them. There is also evidence in the record tending to show that the boy was on the track where he was injured from the time that the engine started from the coal chute about a block and a half away, and that he was in full view from the engine while it was backing up to him. One witness testified that the boy was fastened to the track by having his foot caught between the switch point and the rail, when the switch was thrown, and was screaming and ineffectually struggling to free himself when he was run down by the tender of the backing engine. Other witnesses described the boy's action, as the tender came upon him, by saying that he "kind of raised off his feet," and "gave a sort of jump to get out the way of the engine," moving about six feet in the effort, or that he was walking on the track in front of the tender, and started to run and fell. There is, on the contrary, evidence tending to show that it was impossible for the boy's foot to have been caught in the switch in the manner testified by the witness who said that he saw him with his foot so caught.

There were three persons on the engine, the engineer and fireman, who were in charge of it, and a brakeman, who was riding on it to his place of work at Camden Station. The brakeman testified that he was looking back over the tender all of the way up to the place of the accident, and did not see the boy until after he was injured. The engineer testified that he was on the lefthand side of the engine looking backwards in the way in which he was going until he got to switch No. 29, the place of the accident, and did not see the boy. The fireman testified that he was putting coal in the fire box, and not looking at the track. There was also evidence tending to show that the tender was one of the modern type, at the rear of which there was no provision for a person to stand as a lookout, and that it would not be safe for any one to stand there.

The case was tried before the court and a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff and the defendant appealed.

Twelve bills of exception appear in the record, of which eleven relate to rulings on the admissibility of evidence, and one to the court's action on the prayers.

[1] The first three exceptions were taken to the admission by

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the court, over the defendant's objection, of testimony tending to show that persons had long been in the habit of walking along Wells street and crossing the defendant's tracks in the vicinity of the place of the accident. The court below erred in admitting this testimony. The north and south streets in that section do not cross the property of the defendant which we have designated as Wells Street, nor is there any evidence of the existence of any legalized public crossing of the railroad tracks at or near the place where the boy was run over.

[2] In *B. & O. R. v. Allison*, 62 Md. 487, 50 Am. Rep. 233, we said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way as a footway and not for any business with the railroad is a wrongdoer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use it or create any obligation for especial protection. *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112. Whenever persons undertake to use the railroad in such case as a footway, they are supposed to do so with a full understanding of its dangers, and as assuming the risk of all its perils." We cited many authorities for what was thus said, and we have given expression to similar views in more recent cases. *Price v. P. W. & B. R. R. Co.*, 84 Md. 512, 36 Atl. 263, 36 L. R. A. 213; *Reidel v. P. W. B. R. R. Co.*, 87 Md. 156, 39 Atl. 507, 67 Am. St. Rep. 328; *Westn. Md. R. Co. v. State, Use of Kehoe*, 83 Md. 434, 35 Atl. 90; *Ches. B. R. Co. v. Donahue*, 107 Md. 128, 68 Atl. 507. Those cases differ in principle from *McMahon's Case*, 39 Md. 438, and *Sheridan's Case*, 101 Md. 50, 60 Atl. 280, where the accident occurred to a person using a public street which was blocked by the cars which injured him.

[3] The fourth exception was taken to the admission in evidence over the defendant's objection of section 14 of article 30 of the Baltimore City Code of 1906, requiring a locomotive when used within the city limits to have a man riding on its front when going forward and on its tender when going backward, not more than 12 inches from the bed of the road, etc. That section has been held by us to be now practically obsolete and inoperative in *B. & O. R. Co. v. State, Use of Mali*, 66 Md. 59, 5 Atl. 87, and state, *Use of Harvey v. B. & O. R. Co.*, 69 Md. 346, 14 Atl. 685, 688. We therefore think the ordinance in question should not have been admitted in evidence.

[4] The fifth exception was to the refusal of the court to grant the defendant's prayers to take the case from the jury, when offered at the close of the plaintiff's case. The defendant under the settled law of this state lost the benefit of that exception by introducing its evidence; but, as the same prayers were again offered at the close of the whole case, their propri-

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ety will be considered by us later on. The sixth and seventh exceptions were taken to rulings similar to those presented by the first three exceptions, and are sufficiently disposed of by what we have said in that connection.

[5] The eighth to the eleventh exceptions, which related to the effort of the plaintiff to contradict certain testimony for the plaintiff, were well taken because no sufficient foundation had been laid for the proposed contradiction. It is well settled that, before a witness can be discredited by proof of former contradictory statements, a foundation for such proof must have been laid by interrogating the witness as to the time, place, and person to whom the alleged contradictory statements were made, and the witness must have been asked "whether or not he had said or declared that which is intended to be proved." *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Brown v. State*, 72 Md. 475, 20 Atl. 186; *Peterson v. State*, 83 Md. 194, 34 Atl. 834. The questions which had been put to the defendant's witnesses touching the matters in respect to which it was proposed to contradict them were not such as the law requires. At the close of the case, the plaintiff offered two prayers, both of which the court granted, and the defendant offered seven, all of which the court rejected, except the fourth, which it granted in a modified form.

[6] We find no error in the rejection of the defendant's first, second, and third prayers, when again offered at the close of the whole case, each of which sought to take the case from the jury. These prayers having been offered and rejected at the close of the plaintiff's case and the defendant having elected to go on and offer its testimony, that testimony must be considered by us for the purposes of the present inquiry in so far as it may be available to support the plaintiff's case. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337; *Carroll v. Manganese Safe Co.*, 111 Md. 252, 73 Atl. 665. Conceding the defendant's contention that the plaintiff must be regarded as having been on its track as a trespasser when he was injured, and that, therefore, under our rulings in *Kehoe's Case*, 83 Md. 434, 35 Atl. 90, *Millslagle's Case*, 73 Md. 74, 20 Atl. 785, 25 Am. St. Rep. 571, *Price's Case*, 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213, and *Donahue's Case*, 107 Md. 119, 68 Atl. 507, its employees in charge of the backing engine owed him no duty until they became aware of his presence on the track in a position of peril, we still think there was evidence in the case requiring the court to send it to the jury.

The plaintiff's witness Trump, whose testimony for the purpose of the present inquiry must be taken to be true, testified that the boy's foot was caught between the switch point and the rail when the engine was a block and a half away from him, and that he screamed and yelled and tried in vain to pull his foot loose, but he

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was held fast until the tender ran over him. As the engine and tender approached him, they moved at the rate of but two miles an hour. Both the engineer and the brakeman, who were then on the engine, testified that they were looking back in the direction in which they were moving all of the time, and did not see the boy toward whom they were going until after the tender had passed over him. If those two witnesses told the truth, Trump could not have done so, but their evidence was not conclusive of the fact, and the jury may not have believed them.

[7] The onus was undoubtedly upon the plaintiff in order to support her case to produce evidence sufficient to satisfy a reasonable jury that the defendant's agents were made aware of the presence of the boy ahead of them in a position of peril in time to have avoided injuring him, but she was not bound to establish the fact of the agents' knowledge of the boy's peril by their own admission. She might prove it over their denial if she could satisfy the jury of the fact by competent evidence. Evidence that a person was present and looking at an object would ordinarily be regarded as affording strong *prima facie* proof that he saw it.

None of the eyewitnesses of the accident other than Trump saw the boy before the engine was almost upon him, and their accounts of what happened when they did see him are neither clear nor uniform. The jury, to whom the case was sent by the learned judge below, were the proper parties to estimate and pass upon the credibility of the conflicting witnesses as to what occurred while the engine was backing from the coal chute up to the place of the accident, as well as the weight of the whole testimony.

In *Consolidated Ry. Co. v. Armstrong*, 92 Md. 554, 48 Atl. 1047, and many other cases there cited, where there was testimony tending to show that the defendant or its agents had an opportunity to discover a plaintiff's peril, by the exercise of reasonable care, in time to avert it, it was held that the jury should be instructed that the failure to exercise that care made the defendant liable for an injury resulting from such failure, even though the plaintiff had gotten into the situation of peril through his own negligence. But in *Armstrong's Case* and most of the cases there cited the injured person was not a trespasser, but at the time of his injury was in a place where he had a right to be, such as a public street, either where it crossed a railroad or where its bed was occupied by the tracks of the street railway.

[8] The cases last referred to, when considered together with *Kehoe's Case*, 83 Md. 434, 35 Atl. 90, and the line of cases hereinbefore referred to in connection with it, plainly show that the duty of those in charge of moving railway trains to keep a lookout for and exert care to avoid injuring persons at railway crossings and on public highways where such persons have a

The defendant is expected to be found is entirely correct. The duty of the defendant in respect to the possible presence of persons on the tracks, where, having been found, it is expected to be found. We have previously held in the same area, relevant to and others: "The duty of the defendant to anticipate that persons will go upon the tracks and consequently to exercise a duty of vigilance against the possible or probable presence of persons on the tracks, and to constitute negligence on the part of the defendant whose failure to do so to avoid injuring a person is the basis of a recovery begins only when it begins to make aware of the presence and peril."

2. The defendant's fourth prayer in the form in which was offered and its sixth and seventh prayers, were defective in that they required the duty of the defendant's agents to exercise to protect the plaintiff would begin only when they saw or felt a signal of peril, instead of when they became aware of the peril. If Trump's testimony that the boy was screaming and getting from the time he was caught in the switch would have been in charge of the engine might have been informed of the peril by hearing his cries of distress. The seventh prayer was predicated in part upon the assumption that those in charge of the engine did not keep a lookout as it backed along the track. The engineer and brakeman testified that they kept a constant lookout ahead in the direction in which the engine was going.

The plaintiff's first prayer, which defines her right of recovery, assumes that the evidence, if the jury believe it, bearing the habit of persons to cross the tracks at and near the location of the accident by which the boy was injured, imposed upon the agents of the defendant the duty of expecting the presence of persons on the tracks at that place and the corresponding obligation of keeping a lookout for them and exercising especial care for their protection. That proposition is in conflict with the repeated decisions of this court in respect to the duty and responsibility of a railroad company to unauthorized persons who go upon its right of way. *Price v. P. W. & B. Ry. Co.*, supra; *B. & O. Ry. Co. v. Allison*, supra; *Western Md. Ry. v. State*, Use of *Kehoe*, supra; *Ches. Beach Ry. Co. v. Donahue*, supra.

The plaintiff's second prayer, stating the law as to the measure of damages, was in the usual form and free from objection.

For the error in granting the plaintiff's first prayer and in the rulings in evidence mentioned in this opinion, the judgment appealed from must be reversed and the case remanded for a new trial.

Judgment reversed, with costs, and case remanded for a new trial.

ST. JOHN *v.* RHODE ISLAND CO.

(Supreme Court of Rhode Island, June 9, 1911. Rehearing Denied June 16, 1911.)

[79 Atl. Rep. 1101.]

Street Railroads—Collision with Vehicles—Burden of Proof.*—A driver of a vehicle struck by a street car, in suing for his injury, has the burden to show exercise of care by himself, and that the accident was caused by negligence of the company's employees.

Pleading—Variance.—A plaintiff, suing for particular breach of duty, must prove that and no other.

Street Railroads—Collision with Vehicle—Negligence—Evidence—Sufficiency.—In a suit for injury to the driver of a vehicle in collision with a street car, evidence held insufficient to show negligence by the street railway company.

Exception from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Nelson St. John against the Rhode Island Company. Directed verdict for defendant, and plaintiff brings an exception. Exception overruled.

W. Waldo Robinson, for plaintiff.

Joseph C. Sweeney and *Alonzo R. Williams*, for defendant.

BLODGETT, J. After a verdict by direction of the court in favor of the defendant in this action on the case for negligence, in which action the plaintiff sought to recover damages for injuries alleged to have been received by reason of a collision between a car of the defendant corporation and the wagon which the plaintiff was driving, the plaintiff has brought the case to this court upon his exception to such direction of a verdict. The declaration contains but one count, and charges the alleged negligence of the defendant, as follows: "That the defendant was guilty of negligence in his duty in these premises toward the plaintiff, in this: In hiring careless, inattentive, and incompetent agents and servants to operate said car while it was being run on said roadbed in said public highway."

*For the authorities in this series on the subject of the burden of proving contributory negligence, see last foot-note of *Tecker v. Seattle, R. & S. Ry. Co.* (Wash.), 38 R. R. R. 229, 61 Am. & Eng. R. Cas., N. S., 229; first foot-note of *Danskin v. Pennsylvania R. Co.* (N. J.), 37 R. R. R. 414, 60 Am. & Eng. R. Cas., N. S., 414; first foot-note of *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99.

For the authorities in this series on the subject of the burden of proving negligence, see first foot-note of *Holland v. Northern Pac. R. Co.* (Wash.), 33 R. R. R. 264, 56 Am. & Eng. R. Cas., N. S., 264; first foot-note of *Arkansas & L. Ry. Co. v. Sain* (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579.

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[1, 2] In granting the defendant's motion for the direction of a verdict, the trial justice correctly stated the evidence and the law applicable thereto, as follows: "Now, it is the duty of the plaintiff, in order that he may recover a verdict at your hands, to prove to you by fair preponderance of testimony that at the time this accident happened he was in the exercise of due care, and that the accident happened through the negligence of the defendant's agents and servants. Proof was submitted by him that the accident happened, but there is no evidence submitted by him to show that it happened through the carelessness and negligence of the defendant's servants. The explanation of the accident comes entirely from the witnesses for the defense; and there is no evidence submitted by the plaintiff that those servants were negligent, or not careful servants—none submitted whatever. And there is no evidence submitted to show that even though the servants were incompetent or careless that the defendant company knew anything about it. If a man alleges a particular breach of duty, and rests his case on that particular breach of duty, he must prove that, and no other; and, as I say, there is no evidence tending to show that those servants were careless or incompetent, or that the company knew that they were employing careless or incompetent servants. Besides that, gentlemen, the explanation of this accident comes entirely from the defendant's witnesses, and that shows no negligence, apparently, on the part of the defendant. Under those circumstances, I say it is the duty of the plaintiff to prove to you that he was in the exercise of due care, and that the accident happened through the negligence, and negligence alone, of the defendant's agents and servants. There is no evidence of negligence on their part, and I therefore direct you to find a verdict for the defendant."

[3] It so clearly appears by the record that the plaintiff, while driving by the side of the defendant's car track suddenly attempted to cross the car track in front of said car, bringing his horse to a walk in so doing, without notice or warning to the motorman or conductor, and at so short a distance (10 feet) in front of the car as to make it impossible to stop the car without a collision with the wagon, that an extended comment upon the testimony is unnecessary. The testimony of the plaintiff shows that the car was stopped with the front of the car opposite the rear wheel of the wagon; and the plaintiff, being in a covered wagon, is unable to testify as to the cause of the accident, nor is any witness called on this point in his behalf. The evidence shows no negligence on the part of the defendant in the operation of the car, and clearly does not support the allegation of having incompetent servants, as alleged in the declaration.

The plaintiff's exception is overruled, and the case is remitted to the superior court for the entry of judgment on the verdict.

FLYNN *v.* CHICAGO CITY RY. CO.

(Supreme Court of Illinois, June 20, 1911.)

[95 N. E. Rep. 449.]

Municipal Corporation—Ordinance—Pleading—Necessity.—Where a city ordinance was relied on as a defense merely to an action for injuries, it was admissible under the general issue, and was not required to be specially pleaded.

Negligence—Contributory Negligence—Common Enterprise—Violation of City Ordinance.*—Plaintiff, C., and another, were riding at night in a single-seated buggy without lights, drawn by a blind horse owned and driven by C. on the south side of a city street on which defendant operated an electric railway. C. was endeavoring to sell the horse to plaintiff, and they were driving at the time to try him. All were more or less intoxicated, and both plaintiff and C. had taken turns in driving, though C. was driving when the buggy was struck by a street car, and plaintiff was thrown out and injured. Held, that though C.'s negligence, if any, was not imputable to plaintiff, plaintiff was chargeable with his own negligence, being engaged with C. in a common enterprise, to wit, the driving of a horse and vehicle along the streets at night without lights in violation of a city ordinance, and hence such ordinance was admissible against plaintiff to show that he was negligent per se.

Negligence—Contributory Negligence—Instructions.—In an action for injuries alleged to have been caused by defendant's negligence, it was error to refuse to charge that if plaintiff by using his faculties with ordinary and reasonable care in looking out for danger could have avoided injury on the occasion in question, and he negligently failed to do so and thereby contributed to the injury, if he was injured, then he could not recover.

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; Marcus Kavanagh, Judge.

Action by John Flynn against the Chicago City Railway Company. A judgment for plaintiff was affirmed by the Appellate Court, and defendant brings error. Reversed and remanded.

*For the authorities in this series on the subject of imputed negligence, see foot-note of *Gress v. Philadelphia, etc., Ry. Co. (Pa.)*, 38 R. R. R. 626, 61 Am. & Eng. R. Cas., N. S., 626; first foot-note of *Basler v. Sacramento Gas, etc., Co. (Cal.)*, 38 R. R. R. 554, 61 Am. & Eng. R. Cas., N. S., 554.

For the authorities in this series on the subject of the care required of one in a vehicle driven by another, when it is approaching a railroad crossing, see foot-note of *Stotelmeyer v. Chicago, etc., R. Co. (Iowa)*, 37 R. R. R. 382, 60 Am. & Eng. R. Cas., N. S., 382; last foot-note of *Brommer v. Pennsylvania R. Co. (C. C. A.)*, 38 R. R. R. 51, 61 Am. & Eng. R. Cas., N. S., 51.

Flynn v. Chicago City Ry. Co

George W. Miller (Leonard A. Busby, of counsel), for plaintiff in error.

McGoorty & Pollock, for defendant in error.

HAND, J. This was an action on the case commenced in the superior court of Cook county by the defendant in error against the plaintiff in error to recover damages for a personal injury alleged to have been sustained by the defendant in error in consequence of a collision between a buggy in which he was riding and an electric car operated by the plaintiff in error on one of the public streets of the city of Chicago. The case was tried upon a declaration containing two counts. The negligence charged in the first count was that the defendant, by its servants, so carelessly and negligently drove and managed said car that by and through the negligence and improper conduct of the defendant and its servants said car ran and struck with great force and violence upon and against said buggy; and the second count charged that the defendant, by its servants, carelessly and negligently drove the said car upon one of the public streets of the city without ringing a bell or giving warning of any kind. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the defendant in error in the sum of \$5,000, which judgment was affirmed by the Appellate Court for the First District, and the cause has been removed into this court for further review by writ of certiorari.

Three reasons are urged as grounds for reversal in this court: (1) The contributory negligence of the defendant in error; (2) the rejection of proper evidence; and (3) the refusal to give to the jury plaintiff in error's fourth offered instruction.

The defendant in error and one White were riding in a single-seated buggy drawn by one horse owned and driven by one Cox upon Sixty-Ninth street, an east and west street in the city of Chicago, at about 7 o'clock in the evening of February 11, 1906, on which street the plaintiff in error operated a double-track electric street railway; the south track being the east-bound and the north and west-bound track. When near Prairie avenue, an electric car ran against the buggy, and the same was capsized and the occupants were thrown to the ground, and the defendant in error was severely and permanently injured. Thus far there is no conflict in the evidence. There is, however, an irreconcilable conflict in the evidence as to the manner in which the collision occurred. The evidence of the defendant in error tended to show that Cox was driving said horse and buggy, at a moderate speed, east upon the south track, and that a car overtook him from the west and ran against the rear of the buggy with such force that the buggy, with its occupants, was thrown over the horse, and when the car was stopped, the horse, by the force of the impact, was facing the car; while the evidence of the plaintiff in error tended to show that the horse and buggy were being

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driven west upon the south side of the track, but in such close proximity to the south rail that the car, as it passed, struck the buggy and the buggy was capsized. It was undisputed that, when the car was stopped, the horse and buggy were near the southwest corner of the car and the horse as facing west; that the rear of the buggy or the front of the car was not injured, but there were marks upon the buggy and upon the car which indicated that the right front wheel of the buggy had come in contact with the southeast corner of the car. The jury accepted the view of the witnesses for the defendant in error. In the condition in which the evidence appears in this record it was necessary that the rulings of the court upon the admission of evidence and upon the instructions to the jury should have been substantially correct in order to insure to the parties a fair trial. It also appears from the evidence that the occupants of the buggy had been drinking during the evening and were somewhat intoxicated at the time of the accident; that the horse which Cox was driving was blind; that the night was dark; that the street car was well lighted; that no light was displayed upon the buggy; that Cox was out with the defendant in error and White for the purpose of exhibiting his horse to the defendant in error with a view to sell him the horse; that they had driven some distance, a part of the time the driving being done by Cox and a part of the time by defendant in error.

[1] At the time of the accident there was in force in the city of Chicago an ordinance which made it unlawful for the owner or driver of a wheeled vehicle similar to that in which the defendant in error was riding at the time of the accident to use the same in the nighttime upon the streets of the city without having displayed thereon a light. At the time of the accident this ordinance was being violated, and the plaintiff in error, after proving that there was no light displayed upon the buggy in which Cox and his companions were riding, offered in evidence said ordinance, which was excluded by the court, and it is now urged that the action of the court in excluding such ordinance constitutes reversible error. The ruling of the court upon the admissibility of such ordinance is justified by the defendant in error on the grounds, first, that the ordinance was not specially pleaded; and, second, that, conceding the ordinance was being violated by Cox at the time of the collision and that its violation was negligence per se as to Cox, the negligence of Cox cannot be imputed to the defendant in error, and it is urged that the ordinance, as to the defendant in error, was properly excluded.

It is undoubtedly true that where a cause of action is predicated upon a statute or ordinance the statute or ordinance must be pleaded, but where, as here, the action is not predicated upon the ordinance but the ordinance is invoked as a defense, we

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think such ordinance may be properly admitted in evidence under the general issue. The admissibility of an ordinance under the general issue does not differ, in principle, from the admissibility of a foreign statute as a matter of defense, and the case of *Christiansen v. Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, we think, is in point. On page 151 of 223 Ill., on page 101 of 79 N. E., it was said: "The general rule is that a foreign law must be pleaded. That rule has its exceptions, and it does not apply in a case like this. The plea of not guilty was filed, and under that plea the appellee was properly permitted to introduce in proof, as a part of its defense, the law of the state of Indiana, so far as it was material, to show there was no liability resting upon appellee to respond in damages to appellant for the injury which he had sustained. In *City of Chicago v. Babcock*, 143 Ill. 358, on page 364, 32 N. E. 271, on page 273, it was said: 'In such an action [an action on the case] the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter *ex post facto* which shows that the cause of action has been discharged or that in equity and conscience the plaintiff ought not to recover.' In *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536, it was held that the laws of another state, as to pleading and proof, stand upon the same footing as any other facts, and are not required to be pleaded when they are mere matters of evidence." We are of the opinion the ordinance was properly admissible in evidence under the general issue.

[2] As to the second proposition, while it is true the negligence of Cox could not properly be imputed to the defendant in error, still the defendant in error was responsible for his own negligence, and, if his own negligence contributed to his injury, he could not recover. It was therefore legitimate to make proof of any fact which would tend to establish the negligence of the defendant in error. The evidence showed that the defendant in error and Cox, who owned the horse and buggy, were engaged in a common enterprise, viz., that of testing the qualities of the horse; that Cox had driven the horse for a time and then the defendant in error had taken the lines; that the night was dark; that the road south of the tracks was rough; that the horse was blind; that there were three men in a single-seated buggy; and that the occupants of the buggy were all more or less intoxicated. In view of these facts, we are of the opinion that it was proper to make proof that the vehicle in which the parties, at the time of the accident, were riding, was being driven upon the street in violation of law, which proof would have raised the presumption that all the occupants of the buggy were, as a matter of law, guilty of negligence, which negligence, if it was the proximate cause of the injury, would defeat a recovery. This view, we

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think, is sustained substantially by all the authorities. Mr. Beach, in his work on Contributory Negligence (3d Ed.) § 115, thus states the law: "It is everywhere held, on familiar grounds, that, if the negligence of the occupant contributes with that of the driver and a third person, there can be no recovery against the latter. Thus, if A., being driven in the carriage of B., who is not a common carrier, willingly joins B. in driving over a place obviously dangerous and is injured in consequence, A. has no right of action against the municipality. And where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company, it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen. So it has been held that a failure to look and listen, on the part of one riding with his back to the driver, while approaching a well-known railroad crossing at a fast trot, or to warn the driver, or to take any precautions whatever, was contributory negligence barring recovery. In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if possible."

The author of *Elliott on Railroads* (volume 3 [2d Ed.] § 1174) among other things says: "The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person. But, where persons riding in a vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains. Where the driver is the agent or servant of the injured person, it is held that the negligence of the former is attributable to the latter. It is obvious that, where the negligence of person who receives the injury contributes to the injury, he cannot escape the consequences of his own carelessness. Thus, where one person riding with another saw the headlight of an approaching locomotive, it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding. If the person riding in the vehicle knows that the driver is negligent and he takes no precautions to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge."

In *Hoag v. New York Central & Hudson River Railroad Co.*,

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111 N. Y. 199, 203, 18 N. E. 648, a husband and wife were killed by collision with a passenger train while attempting to cross the company's track at a crossing. The husband was driving, and the wife, for whose death the suit was brought, was riding with him on the way to their home. There was a directed verdict for the defendant and judgment thereon. The Court of Appeals reversed this judgment on the ground that under the facts in that case the question of contributory negligence on the part of the wife should have been submitted to the jury, and Judge Finch, writing for the court, suggested the inferences which could be drawn both for her and against her from the evidence on that question. The following quotation from the opinion is directly in point: "If they could not see it [referring to the train], or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that if she had looked she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe."

In *Brickell v. New York Central & Hudson River Railroad Co.*, 120 N. Y. 290, 293, 24 N. E. 449, 17 Am. St. Rep. 648, the Court of Appeals had the same question before it again. The plaintiff was injured through a collision between a wagon in which he was riding and an engine hauling a train, at a highway crossing. The plaintiff was riding on the same seat with the driver of a single-horse buggy, and paid the driver for carrying him a short distance from a station on the company's road to the village of Palmyra. The accident was in the early-afternoon. It had been snowing some, the wind was blowing, and the top of the buggy was raised and inclosed, except in front. Neither the driver nor the plaintiff made any effort, as they approached the crossing, to ascertain if a train was approaching. There was a judgment in favor of defendant, which the Court of Appeals affirmed. The court in its opinion said that the evidence showed contributory negligence on the part of the plaintiff, and then continued: "The excuse attempted to be set up for such conduct that the top of the buggy and the snow and wind rendered it more difficult to hear the noise of an approaching train, seems to prove and emphasize their carelessness and want of attention in making an effort, under those circumstances, to learn there was no train approaching the crossing. They well knew of the condition of things and of the location and surroundings of the crossing, and that they were called upon to use more than ordinary prudence in effecting the crossing under such circumstances. The general rule in this class of cases is that the burden of establishing, affirmatively, freedom from contributory negligence, is upon the plaintiff, or, in the language of the opinion in *Tolman v. S. B. & N. Y. R. R. Co.*, 98 N. Y. 202 [50 Am.

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Rep. 649], that 'plaintiff approached the crossing where the collision and injury occurred, with prudence and care and with senses alert to the possibility of approaching danger.' And this rule obtains even where the railroad company neglects to ring its bell or sound its whistle, as required when its trains approach a crossing. *Cullen v. D. & H. C. Co.*, 113 N. Y. 688 [21 N. E. 716]. Nor do I think that this rule is to be relaxed in favor of the plaintiff because of the fact that he was being carried in a vehicle owned and driven by another. The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it. *Robinson v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 11 [23 Am. Rep. 1]. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable. The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing and the environments, and with at least the same, if not better, opportunity of discovering dangers, that the driver possessed, and without any embarrassment in communicating them to him. The rule in such case is laid down in *Hoag v. New York Central & Hudson River Railroad Co.*, 111 N. Y. 199 [18 N. E. 648], where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both killed by a collision at a crossing, and in an action brought by the administratrix of the wife against the railroad company it was held 'that she had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe.'"

~ In *MacGuire v. New York City Railway Co.*, 52 Misc. Rep. 591, 593, 102 N. Y. Supp. 749, 751, the plaintiff and Dr. Mandel were sitting on the back seat of plaintiff's victoria, drawn by two horses driven by a coachman. There was a collision between the victoria and a street car, resulting in the plaintiff's injury, for which he sued and recovered a judgment, which, on appeal, was reversed. This case contains an element not in the *Hoag* and *Brickell* Cases—i. e., the driver was the servant of the plaintiff—so that it might be said that the plaintiff, having control over the driver, was chargeable with his negligence, but the opinion turns upon the negligence of the plaintiff himself rather than upon the negligence of the driver. The court said in reversing the judgment: "It is urged by defendant's counsel, in his brief, that the plaintiff must have known that by this time the north-bound car was pretty close at hand and that the south-bound car might to some extent obstruct the view of the motor-

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man of the north-bound car, so far as plaintiff's carriage was concerned and that plaintiff said nothing to his driver but ran the risk of getting over before the car struck him. We are of the opinion that plaintiff did not satisfactorily establish his freedom from contributory negligence." It is a case where the coachman, driving, waited for a south-bound car to pass and then started to drive slowly across the tracks on Broadway, when the fore part of the carriage was struck by an approaching north-bound car. Plaintiff admitted that he saw the north-bound car rapidly approaching. His victoria then stopped for the south-bound car to pass, and he then allowed his driver to start over the tracks with the view somewhat obstructed by the south-bound car and without taking any precautions whatever to caution or warn the driver of the danger, and this was held to be negligence upon his own part which would defeat him, although the driver was also negligent in undertaking to cross the tracks without any effort to observe if a north-bound car was coming.

Donnelly v. Brooklyn City Railroad Co., 109 N. Y. 16, 15 N. E. 733, was a case where the plaintiff, with one McNally, had driven to the city of Brooklyn in the evening in a wagon drawn by one horse, with a load of fish for market. They started to return about midnight, taking the route of an avenue on which were two tracks of the defendant, upon which were run, either way, trains of cars drawn by dummy engines. The tracks were in the middle of the avenue, with sufficient width on either side for vehicles. McNally was driving, with plaintiff riding by his side. They had been driving on the right-hand railroad track, when, hearing a wagon approaching, they turned to the left and drove upon the other track, used by trains coming towards Brooklyn. While upon this track they saw and heard coming towards them in the distance a dummy engine. No effort seems to have been made by either of them to escape from the danger of collision. The plaintiff did nothing "except to sit on the wagon and shout twice to the engineer to hold up." He made no objection to McNally turning into the track where they were then driving, although acquainted with the avenue and the tracks, and apparently made no effort to get McNally to drive out of the track when he saw the dummy engine coming. A judgment which he obtained for his injuries was reversed. The Court of Appeals, speaking through Mr. Justice Gray, said that the case should not have been submitted to a jury. On page 22 of 109 N. Y., on page 735, of 15 N. E. the court said: "We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous

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track. * * * After a careful consideration of this case we think, in view of the knowledge possessed by plaintiff and of his conduct at the time, that there was contributory negligence and he was not entitled to recover."

Smith v. Maine Central Railroad Co., 87 Me. 339, 350, 32 Atl. 967, 971, is directly in point. The plaintiff accepted an invitation from one Ryder to ride with him to a neighboring town. Ryder was driving. Smith had no more control over him nor over the team that any one may be said to have riding by invitation in a buggy with another. They were injured in a collision while attempting to cross the defendant's tracks at a railroad crossing. There was a verdict in favor of the plaintiff. Under the practice in Maine the case reached the Supreme Court under a motion to set aside the verdict, where it was held that the verdict was not justified by the evidence and could not be permitted to stand. Among other things the court said, in speaking of the accident: "It was undoubtedly caused, directly or proximately, by a want of due care and prudence on the part of the plaintiff himself. True, the plaintiff was not in control of the team as driver, but was riding by a friendly invitation from Ryder and without other compensation than his companionship. But the rule that the negligence of the driver is not to be imputed to his companion under such circumstances has very little application to the facts of this case. Plaintiff was occupying the same seat with Ryder, and had the same opportunity, and after they reached the defendant's main track probably a better opportunity, for discovering dangers. Before reaching the Bangor and Aroostook track they conversed about the lights of the defendant's station, and after crossing stopped and had a further conference, at which they agreed in 'guessing that everything was all right.' It is obvious that the driver was ready and willing to act upon any information or suggestion from his companion. It is clear, also, that the plaintiff instinctively felt that there was a responsibility resting upon him as well as upon the driver. He knew that they were crossing railroad tracks, and was bound to know that a railroad track is itself a warning and a crossing a place of danger. He admits that when within fifty feet of the collision he voluntarily assumed the duties of a lookout. He saw the headlight, which Ryder does not appear to have seen, but did not mention the fact to Ryder. The horses were steady and well trained and would have promptly heeded the word to stop either from the plaintiff or the driver, but the plaintiff neither asked the driver to stop the horses nor to hurry them forward. His conduct was not that of a reasonably prudent man. It is the duty of the passenger, when he has the opportunity to do so, as well as of the driver, to learn of danger and avoid it if practicable. * * * In either view, the contributory negligence of the plaintiff is clearly established."

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In *Bush v. Union Pacific Railroad Co.*, 62 Kan. 709, 64 Pac. 624, the plaintiff, a young lady, was invited by one Bowhay to ride with him on the evening of the accident. In attempting to cross the company's railroad tracks at a railroad crossing they were struck by a passenger train and she sued to recover for the injuries received. It will thus appear that she was merely an invited guest and that Bowhay was driving. At the close of the plaintiff's evidence the defendant demurred thereto, and the court sustained the demurrer and rendered judgment against the plaintiff for costs. On appeal this judgment was affirmed, and the plaintiff was held to have been guilty of such contributory negligence as defeated her right to recover. In the course of the opinion it was said: "It is contended by plaintiff in error that, if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains, such negligence is not imputable to the plaintiff in error. They want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose—mutual pleasure. Her opportunity and ability to see and appreciate the danger were equal to his. She was in no way relying upon him. It is true he furnished the vehicle and did the driving, but she seems to have acted independently of him. When they started from the point where they had stopped for the freight train, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was, in fact, the first to see it."

In *Illinois Central Railroad Co. v. McLeod*, 78 Miss. 334, 341, 29 South. 76, 77, 52 L. R. A. 954, 956, 84 Am. St. Rep. 630, McLeod hired an open carriage, two horses, and a driver to drive him to his desired destination and back again. In attempting to cross a railroad crossing he was injured in a collision between a train and the conveyance in which he was being driven. It was an open conveyance, and McLeod had every opportunity the driver had to avoid the accident. He died from his injuries, and suit was brought to recover for his death. A judgment was recovered, which the court reversed, saying, among other things: "Mr. McLeod gave the driver no directions at all and in no way interfered with his management of the team. From the facts so put, it is too plain for controversy that, if the driver had been the party killed, no court would have permitted recovery. Recognizing this palpably clear proposition, the effort of appellees is to put Mr. McLeod in a different category, on the theory that the driver's negligence cannot be imputed to him, since he was merely the hirer of the driver, the vehicle, and the team. But this doctrine cannot be stretched to save a case like this. It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when

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the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action and to check or remonstrate with the driver. *Dean v. Pennsylvania Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Smith v. Maine Central Railroad Co.*, 87 Me. 350, 32 Atl. 967, and the other authorities cited in the brief of counsel for appellant."

Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421, is an interesting case, where all of the leading authorities are referred to. *Fechley* was injured by the collision of a street car with a buggy in which he was riding. It was a one-horse buggy belonging to a man named *Pierce*, and *Pierce* was driving. It was election day, and *Pierce*, who was interested in a candidate for sheriff and who had endeavored to induce *Fechley* to vote for his candidate, was driving *Fechley* to the north side of the city, having invited *Fechley* to ride over in his buggy to make him acquainted with the candidate. *Fechley* accepted the invitation, and got into the buggy, and they were proceeding upon this errand when the collision occurred. There was a judgment for the defendant, which was affirmed. Among other things the court said on page 366 of 119 Mo. App., on page 423 of 96 S. W.: "Appellant himself must have been free from negligence proximately contributing to his injury or he is entitled to no damages, granting that *Pierce's* fault does not preclude a recovery, and that the motorman's fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may intrust his safety absolutely to the driver of a vehicle, regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this state and in most jurisdictions is that if a passenger is aware of the danger, and that the driver is remiss in guarding against it and takes no care himself to avoid injury, he cannot recover for one he receives. This is the law, not because the driver's negligence is imputable to the passenger, but because the latter's own negligence proximately contributed to his damage. *Marsh v. Railroad Co.*, 104 Mo. App. 577, 78 S. W. 284; *Dean v. Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Township of Crescent v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Koehler v. Railroad Co.*, 66 Hun, 566, 21 N. Y. Supp. 844; *Hoag v. Railroad Co.*, 111 N. Y. 199, 18 N. E. 648; *Brickell v. Railroad Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; 2 *Thompson on Negligence*, § 1621; *Beach on Cont. Negligence*, § 115; 3 *Elliott on Railroads*, § 1174." The court then proceeded to discuss the question of *Fechley's* contributory negligence, and further said (119 Mo. App. at page 369, 96 S. W. at page 424): "*Fechley* was imprudent in doing nothing, personally, to insure his safety. The essential fact is

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that Pierce did not look in time, as Fechley knew or in reason ought to have known. Therefore Fechley should have stopped Pierce or told him to look for a car, or have looked himself, before they advanced so far into danger. It is palpable, from appellant's own testimony, that he was giving no heed to his safety, but either was relying blindly on Pierce, or for some reason was not aware of the proximity of the tracks."

In *Lake Shore & Michigan Southern Railway Co. v. Boyts*, 16 Ind. App. 640, 647, 45 N. E. 812, 814, Boyts was riding in a cutter with a friend named Hamilton, whose cutter it was, and who sat in the same seat with Boyts, and was doing the driving. Boyts was injured through a collision with a railroad train while attempting to cross the company's tracks. A judgment in his favor was reversed, with instructions to enter a judgment in favor of the company. The following from the opinion is directly in point: "But even if the negligence of the driver (Hamilton) cannot be imputed to the appellee—and, as shown by the above cases, it cannot be—the appellee must still show that he was free from negligence contributing to his injury. And the same rule would not apply where the guest was riding inside a closed carriage, without opportunity to discover danger and inform the driver of it, that would apply where the guest was seated at the driver's side and had the same opportunity with the driver to discover and avoid danger. *Brickell v. New York Central & Hudson River Railroad Co.*, 120 N. Y. 290 [24 N. E. 449, 17 Am. St. Rep. 648]. Although he may be simply a guest, if he has the opportunity to do so it is no less his duty, than it is the duty of the driver, when approaching a railroad crossing, to look and listen and to learn of danger and avoid it if practicable."

In *Miller v. Louisville, New Albany & Chicago Railway Co.*, 128 Ind. 97, 99, 27 N. E. 339, 25 Am. St. Rep. 416, the intestate and her husband were riding along the highway in an ordinary farm wagon, with the husband driving and managing the team. Attempting to cross a railroad track, they were struck by an approaching train, and the intestate was killed. It appeared the negligence of her husband was made clear by the evidence, so that the question whether she could be charged with that negligence was directly involved, and, if not, then whether she was herself guilty of such negligence as defeated the right to recover for her death. The court made mention of the fact that the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, had never been sanctioned by that court, and among other things said: "Rejecting, as we do, the doctrine of imputed negligence, we are nevertheless required to hold that there can be no recovery in this action. We are led to this conclusion by the fact that the intestate was not shown to be free from contributory negligence. It has long been the settled law of this state that a plaintiff cannot recover in such a case as this unless it affirmatively appears that his own

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negligence did not proximately contribute to his injury. * * * The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view, and took no precautions to warn her husband or to avert the threatened danger, although slight care might have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care. The rule we adopt is laid down in the well-reasoned case of *Brickell v. New York Central & Hudson River Railroad Co.*, 120 N. Y. 290 [24 N. E. 449, 17 Am. St. Rep. 648]."

In *Brannen v. Kokomo Gravel Road Co.*, 115 Ind. 115, 118, 17 N. E. 202, 204, 7 Am. St. Rep. 411, the plaintiff, with several others, was riding in a wagon driven by one of the other occupants of the wagon. The driver, it appears, was intoxicated. As they approached a toll gate owned by the defendant, an attempt was made by the driver to drive rapidly through the gate to avoid payment of toll. The defendant had a pole so arranged that it could be thrown across the passageway through the gate to prohibit people from driving through, and the defendant's employee in charge of the gate attempted to stop the driver from driving through by dropping this pole, and in so doing the pole struck the front end of the wagon and the plaintiff was injured. The court held that the plaintiff could not be charged with the negligence of the driver, but that he was chargeable with his own negligence, and that because of his own negligence he could not recover. The following is quoted from the opinion: "In the first place, the intoxication of the driver and his course in striking the young horses and attempted to run them through the gate without the payment of toll show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due and should be paid at the toll gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate without the payment of toll. For aught that is shown in the special verdict, he was acquiescing in the purpose of the driver and all that he did in attempting to carry out that purpose. Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed to the injury, it must follow that he cannot recover."

In *Township of Crescent v. Anderson*, 114 Pa. 643, 646, 8 Atl. 379, 381, 60 Am. Rep. 367, Mrs. Anderson was riding in a spring wagon, having with her three small children. Her father sat on the front seat, and was driving. The seat on which Mrs. Anderson rode was fastened by a spring catch, so as to be removable at pleasure. When they reached a bridge in the highway, it was found to be in the process of repair, and could not

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be crossed. There was a space above the bridge wide enough to admit a wagon, and through this space McKinley, the father, drove to the other side. As the front wheels ascended the bank from the ravine through which they drove, one of the catches on the seat on which Mrs. Anderson rode sprang out, the seat turned over, and she was precipitated into the ravine and injured. She and her husband sued the township, and there was a judgment obtained, but the Supreme Court of Pennsylvania reversed it. Discussing the negligence of Mrs. Anderson herself—and that was what defeated her—the court said: "She came to the bridge in daytime, about 11 o'clock in the morning, and she could see plainly that the route around the bridge was not prepared for the passage of vehicles. The ravine, its approaches, its depth, and width were all fully exposed to view. There was no water in it. There was no latent defect or danger. If it was a dangerous place she could as readily discern the fact as her father or the supervisor, and it was her duty to see what was clearly exposed to her view. Under the noting of *Carlisle v. Brisbane*, 18 Wkly. Notes Cas. 220 (3 Ammerman, 544 [113 Pa. 544, 6 Atl. 372, 57 Am. Rep. 483]), the negligence of McKinley could not, perhaps, be imputed to her, but she must be held for her own negligence. The danger which was obvious to him was as obvious to her. She made no request of her father to take any other route, so that she might get out of the wagon. She made no objection to crossing the ravine. She willingly joined McKinley in testing the danger, and she is responsible for the consequences of her own act."

In *Dean v. Pennsylvania Railroad Co.*, 129 Pa. 514, 524, 18 Atl. 718, 721, 6 L. R. A. 143, 145, 15 Am. St. Rep. 733, Dean, while crossing the tracks of the defendant company in a wagon, was struck by a locomotive and injured. Fields was the owner of the horse and wagon, and was driving. Under the evidence, the negligence of Fields was clear. The court so held, and then inquired, "But can the negligence of Fields be imputed to Dean?" There then followed a somewhat extended analysis of the authorities holding that Dean was not chargeable with the negligence of Fields, when the court, taking up directly the question whether Dean was guilty of negligence, concluded: "Dean knew the locality well. He had crossed the tracks frequently at this point. He knew that a train was due about that time, and that he was approaching the railroad track at a fast trot, yet he took no precautions. He was certainly responsible for his own negligence. He sat with his back to the driver, and, although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look, and listen or to permit him (Dean) to get out, and the danger was as obvious to Dean as it was to Fields. The testimony is wholly to the effect that the plaintiff committed him-

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self voluntarily to the action of Fields, that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Township of Crescent v. Anderson*, 114 Pa. 643 [8 Atl. 379, 60 Am. Rep. 367]; 6 Cent. Rep. 616." A judgment of nonsuit entered by the lower court was affirmed.

We have not been able in the course of our research to find, neither have counsel pointed out, any case decided by this court where this precise question has been considered. It is clearly, however, we think, the law of this state that under conditions such as are presented here the negligence of Cox will not be imputed to Flynn. But, as was said at the outset, Flynn is not sought to be charged with the negligence of Cox, but with his own negligence, and that he may be so charged is abundantly sustained by these authorities. Flynn knew the whole situation as it existed. He joined Cox and White in testing the danger of driving along that street, whether east or west, at that time of night without a light upon the buggy. The plaintiff in error had a right to show the jury the conditions under which the buggy was being driven, and one of the things which the jury had the right to know, and which the plaintiff in error was entitled to prove, was that the buggy was being driven upon the streets of Chicago in the nighttime in violation of an ordinance of the city, which was negligence per se.

[3] The plaintiff in error's fourth refused instruction reads as follows: "If you believe from the evidence that the plaintiff, by using his faculties with ordinary and reasonable care in looking out for danger, could have avoided injury on the occasion in question, and that he negligently failed to do so and thereby contributed to the injury, if you believe he was injured, then he cannot recover in this case." This instruction stated a correct proposition of law, and, as the principle therein contained was not covered by any given instruction, we think its refusal constituted reversible error. The principle of this instruction was approved in *Chicago City Railway Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477.

The judgments of the superior and Appellate Courts will be reversed, and the cause will be remanded to the superior court for a new trial.

Reversed and remanded.

ATLANTIC COAST LINE R. CO. *v.* CITY OF GOLDSBORO.

(Supreme Court of North Carolina, May 31, 1911.)

[71 S. E. Rep. 514.]

Railroads—Street Crossings—Change of Grade—Railroad Charter.—The charter of a railroad, authorizing it to construct its road to cross any public way, provided that, whenever it crosses such public road, it shall cause its road to be so constructed as not to impede the passage along the public road, is not limited to public roads existing when the railroad was constructed, but requires it to conform its grade to streets subsequently constructed across it

Railroads—Street Crossings—Change of Grade—Power to Order.—Revisal 1908, § 1097(10), authorizing the Corporation Commission to require the raising or lowering by a railroad of its track at any crossing, and to designate who shall pay for the same, does not deprive a city of the right to exercise its police power, under its charter, in that regard; but is supplementary merely.

Railroads—Street Crossings—Change of Grade—Limitations.—Revisal 1908, § 388, providing that no railroad shall be barred by limitations as to its right of way by occupation of it by another, has no application where a city is not contending for the soil of any part of a right of way, but is merely contending for the right to require the railroad to change the grade of its roadbed where it is crossed by streets, so that public travel and the drainage of the city may not be impeded.

Railroads—Moving Cars in City—Ordinances—"Shifting Cars."*—An ordinance prohibiting a railroad running through the city from "shifting" cars—that is, cutting out and putting in cars in the making up of a train—within certain four blocks in the heart of the city, except between 6:30 and 8:30 a. m. and between 4:30 and 6:30 p. m., or from allowing any car to stand for longer than five minutes within such space, is a valid reasonable exercise of the police power. (Per an equally divided court.)

Appeal from Superior Court, Wayne County; W. J. Adams, Judge.

Action by the Atlantic Coast Line Railroad Company against the City of Goldsboro. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Munroe, Geo. B. Elliott, and Geo. M. Rose, for appellant.

D. C. Humphrey and Aycock & Winston, for appellee.

*For the authorities in this series on the subject of the power of municipalities to regulate the operation of railroads in streets, see foot-note of *City of Erie v. Erie Traction Co.* (Pa.), 31 R. R. R. 121, 54 Am. & Eng. R. Cas., N. S., 121.

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CLARK, C. J. The Atlantic Coast Line Railroad, originally the Wilmington & Weldon Railroad Company, occupies with its track the chief street of the city of Goldsboro. Its right of way, 65 feet on each side of its roadbed, embraces the whole of what is known as East and West Center streets, which extend north and south the entire length of the city. The right of way was originally acquired about 1835, and the town has been built up on either side and became incorporated in 1847. The city of Goldsboro, under the authority of the powers granted in its charter, has instituted a system of grading its streets and of drainage extending throughout the city. In pursuance of this work, the roadbed of the railroad on Center street in some places is now six inches and from that to eighteen inches higher than the grade of that street and of the other streets of the city which cross East and West Center streets at right angles. The city authorities have passed an ordinance providing that "all railroad companies owning tracks on East and West Center streets, between Walnut and Vine streets, in said city of Goldsboro are hereby required to lower said tracks, so as to make the same conform to the grade line of said streets and said tracks to be filled in between rails; the grade line of said street being as follows: Beginning at the present grade line, corner of Walnut and East and West Center streets to be lowered 6 inches to corner of Mulberry and East and West Center streets, 10 inches to corner of Ash and East and West Center streets and 18 inches to corner of Vine and East and West Center streets." Another section of the ordinance provides that failure or refusal to comply with the ordinance should be a misdemeanor and fined \$50. The plaintiff attacks this ordinance as being unconstitutional and void, and sought to enjoin all enforcement of the ordinance by a criminal proceeding. The city has heretofore graded and paved at its own expense said East and West Center street outside of that part of the street occupied and used by the defendant as its roadbed. The injunction was refused, and the plaintiff appealed.

The city has from time to time laid out numerous streets crossing said right of way, and has worked and maintained its streets and cross-streets for more than 60 years, including all of East and West Center streets outside of the actual space occupied by plaintiff's roadbed. As a general rule, a court of equity has no jurisdiction to restrain a state from prosecuting for a violation of its statutes and ordinances. The ordinances in question were made by the city in pursuance of its governmental authority. We need not enter into the learned and elaborate discussion as to what cases, if any, present exceptions to this general rule, for we are of the opinion that the ordinance requiring the plaintiff to lower its tracks from 6 to 18 inches at the points where the cross-streets pass over the railroad track is a legal exercise of the public authority vested in the defendant. The plaintiff took its

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charter expecting that towns and cities would grow up along the line of its road, and knowing that with the development of the country new roads, and in the cities and towns that new streets, would be laid out across its right of way. And it took its charter knowing, too, that the state would have the right to lay out such roads and new streets, and to require the railroad to make such alterations as would prevent the passage over its track by the public being impeded. In *English v. New Haven*, 32 Com. 241, it was held that the city had the right to require the railroad company to widen the crossing of a street over its track, or to make such other changes as the public convenience and necessity might require, in order that there should be no hindrance to the public in crossing the railroad track. In *Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. In *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, the subject is fully discussed in a very able opinion which holds that a railroad corporation must make such alterations in the change of its grade as will conform to the new grading of the streets adopted by the city. In *railroad v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, it was held that: "The right to exercise the police power is a continuing one that cannot be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based. Such power when exercised in the interest of public health and safety is to be maintained unhampered by contracts and private interests; hence an ordinance by a city compelling a railroad to repair a viaduct constructed after the opening of a road is valid though the city for a substantial consideration had contracted to relieve the railroad company from making such repairs for a term of years."

[1] In the present case, however, there was no contract exempting the railroad from changing its grade at such crossings when required. Indeed, section 27 of plaintiff's charter in the laws of 1833 (Priv. Acts 1833—34, c. 78) expressly requires the plaintiff to do what the city now requires. Said section provides: "It shall be lawful for the said railroad company in the construction of its said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any such road; provided whenever they intersect and cross such public or private road the president or directors shall cause the railroad to be so constructed as not to impede the passage of travelers on said public road or private way aforesaid." In *Minneapolis v. Railroad*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 307, 120 Am. St. Rep. 581, the Supreme Court of Minnesota held that an

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almost identical provision in the charter of a railroad company was as applicable to new public roads laid out across the right of way as it was to old roads over which the right of way ran, and said: "The purpose of incorporating this particular provision in the charter of the railroad company was in the interest of the public and to require the railroad company to keep in good repair all crossings at the intersection of highways. * * * The evils intended to be guarded against are the same, and apply equally to both new and old streets. There was no reason why the Legislature should deem it prudent to provide for existing highways only, and we do no violence to the rules of statutory construction in holding that the provisions of defendant's charter were intended to include all streets and highways intersected by railroads whether laid out before or after building of the railroad. The expression of the statute is special perhaps; but for the reason therefor is general. The expression must therefore be deemed general. A railroad company accepts and receives its franchise subject to the implied right of the state to lay out and open new streets and highways over its tracks, and must be deemed as a matter of law to have had in contemplation at the time its charter was granted, and is bound to assume all burdens incident to new, as well as existing, crossings." The same doctrine has been held in Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the United States Supreme Court. Indeed, the above case from Minnesota was affirmed 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060. In the above-cited case of *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, the railroad ran across the public road which was not then a street. When the territory was taken into the city, its authorities changed the road to a street and raised the grade at that point, and required the railroad to raise its grade. This the railroad refused to do unless the city would pay the expense. The court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city; and, where the public welfare demands a change of grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossing as will conform to the new grade. That case is exactly in point. In the course of its opinion the court said: "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings" (*Lancaster v. Railroad*, 29 Neb. 412, 45 N. W. 469; *Railroad v. Smith*, 91 Ind. 119, 13 Am. & Eng. Ry. Cas. 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands (*English v. New Haven Co.*, 32

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Conn. 240). The doctrine is further clearly stated thus by the court: "When the railroad company laid its track across the highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so the presence of the railroad necessitates a certain character of crossings and safeguards which otherwise would not exist; and, with however much plausibility it might be argued that the public authorities should be required to do just such work as they would have to do did the railroad not exist, it is certain that the railroad company should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common law is embodied in this statute. It is the railroad which makes the construction of a railroad crossing necessary, whether the highway be laid out before or after the construction of the railroad."

In *Railroad v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, it is said: "As the Supreme Court of Minnesota points out in its opinion (98 Minn. 380, 108 N. W. 261, 28 L. R. A. [N. S.] 298, 120 Am. St. Rep. 581), the state courts are not altogether agreed as to the right to compel railroads without compensation to construct and maintain suitable crossings at streets extended over its right of way after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581. There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a corporation or an individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of obligations of contract." Here the city, in pursuance of its right, has graded the streets of the city and put in a system of drainage, both of which are impeded by the railroad maintaining its roadbed on Center street from 6 to 18 inches above the level of the streets crossing it; its roadbed extending through the entire length of the city on this main street.

[2] The plaintiff earnestly contends that, inasmuch as Rev. 1908, § 1097 (10) authorized the Corporation Commission to require the raising or lowering by a railroad of its track or highway at any crossing and to designate who shall pay for the same, thus deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in deroga-

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tion of that conferred in the charters of towns and cities, but is supplementary merely.

[3] The plaintiff also contends that Revisal, § 388, that no railroad company, etc., shall be barred by the statute of limitations as to its right of way, etc., by occupation of the same by any person whatever, deprived the city of the right there claimed. This is a misconception. The defendant is not contending for the ownership of the soil of East and West Center streets. It is merely asserting its right to require the railroad company to change the grade of its roadbed where it is crossed by other streets so that public travel and the drainage of the city may not be impeded.

[4] A further ordinance of the city prohibits the railroad from doing any "shifting on East and West Center streets between Spruce and Ash at any other time than from the hours of 6:30 and 8:30 a. m. and from 4:30 to 6:30 p. m., or to allow any car to stand for a longer period than 5 minutes at any point on East and West Center streets between Spruce and Ash under a penalty of \$50 for each offense." East and West Center streets constitute the main street of the town, and that portion of it between Spruce and Ash—four blocks—is the very heart of the city. In a former action, in which this plaintiff in this case was a defendant (*Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292), the plaintiff herein, which was defendant in that action, alleged in its answer as follows: "The operation of the trains along said Center street increases annually and the danger accordingly. Trains are constantly passing, and the crossings, notwithstanding the utmost diligence and care on the part of the railroad, are necessarily blocked. Said Center street is the main business street in the city. It is frequently crowded with pedestrians and vehicles, and the operation of so many trains daily throughout the length of said street is fraught with danger to life and property." This statement, admission, and averment of the plaintiff herein, made under oath, is set up in the answer in this case in which an injunction is sought, and it is admitted in the reply. We understand the ordinance in forbidding "shifting" within the limited space of four blocks, on the main street in the center of the town, to refer to what is commonly understood by that expression, to wit, the "cutting out and putting in" cars in the making up of a train before it is dispatched on its journey. Such a regulation certainly cannot be held void, and is a reasonable exercise of the police power necessary for the convenience and safety of the public at the four crossings designated. Whether such ordinance would be reasonable in smaller towns is a question not before us. We certainly do not understand the term "shifting" to refer to the "transfer" of a train of cars already made up and to be delivered by the plaintiff company to another railroad company to

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be transported. The ordinance does not apply to the transfer of a car or cars from one railroad to another through the city. Whether an ordinance forbidding the transfer of the cars from one railroad to another through said street except at specified hours would be reasonable in view of the fact that at Goldsboro such cars can be transferred by way of the physical connection of the tracks of all the railroads on the edge of town at the new Union station might admit of debate. But that question is not before us. The plaintiff railroad company has its shifting yards further out, where its trains can be made up, and where at least the chief part of the necessary shifting can be done. Certainly it is a reasonable exercise of the police power to forbid such "shifting" except at specified hours on four blocks of the plaintiff's track in the heart of the town. The plaintiff's official returns show \$223,000,000 of property owned by it. The defendant's counsel having adverted to the very large proportion of this property held by the plaintiff in this state, the plaintiff's counsel replied that Goldsboro had only 6,107 population, and contended that for "a little town like that to interfere with the operation of so vast an enterprise" was, to use his expression, "like the tail wagging the dog." It is such a mistaken standpoint that doubtless induced the plaintiff on this occasion, and has so often induced such corporations, to assert what they deem their rights in defiance of the evident convenience and desires of the public by means of whose patronage such corporations thrive, and make their profits. It is true the city of Goldsboro is not large. But the powers it has exercised in making these ordinances it exercises in the name of and by the right of the sovereignty of the people of this state. From that sovereignty the plaintiff derives its rights and its very existence. It was incorporated solely for the public convenience and subject to public regulation. Its stockholders were exempted from personal liability, and it was granted the power of the state's right of eminent domain to procure its right of way and to exercise its vocation. The right of the plaintiff to derive a profit from its business is an incident of a private nature and subject to the right of the sovereign to regulate its operations and to "alter or repeal its charter at will." Const. art. 8, § 1.

The requirement by the authorities of Goldsboro that the plaintiff railroad company shall at its own expense (\$3,400) change its grade where its road is crossed by other streets to conform to the grade adopted by the city and its prohibition of "shifting" to make up trains on the main street of the town, within four blocks in the heart of the city, except in specified hours, is a lawful exercise of the police powers conferred upon the city by the sovereign power in this state. *Cooper v. Railroad*, 140 N. C. 229, 52 S. E. 932, 3 L. R. A. (N. S.) 391; *Wilson v. Railroad*, 142 N. C. 348, 55 S. E. 257; *Gerringer v. Railroad*, 146 N.

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C. 35, 59 S. E. 152. The only unreasonable aspect of the controversy is that the plaintiff should have resisted such requirements, instead of yielding immediate assent, or indeed preventing the necessity of the passage of such ordinance, by anticipating the wishes of the public in a matter so essential to the safety, comfort, and health of the town.

Affirmed.

CROWLEY *et al* v. PENNSYLVANIA R. Co.

(Supreme Court of Pennsylvania, April 10, 1911.)

[80 Atl. Rep. 175.]

Railroads—Obstructing Street Crossing—Injuries to Pedestrian.*

—Where a railroad obstructs for an unreasonable length of time a public crossing with a train of empty coal cars, and a boy in attempting to cross is violently thrown from the platform of one of the cars by the sudden starting of the train without warning, the railroad company will be liable.

Parent and Child—Injury to Child—Damages to Widowed Mother.

—A widowed mother can recover damages on her own account for injuries negligently inflicted on her minor son.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary Crowley and Edward Crowley, by Mary Crowley, his next friend, against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

E. J. Sellers, for appellant.

Thomas James Mcagher, for appellees.

STEWART, J. [1] The variance between the allegations and proofs, so much complained of, is not only more apparent than real, but relates to matters immaterial. It is of no importance

*For the authorities in this series on the subject of the liability of a railroad for injuries resulting from obstructing a crossing with standing train or cars, see first foot-note of *Lindler v. Southern R. Co.* (S. C.), 36 R. R. R. 334, 59 Am. & Eng. R. Cas., N. S., 334.

For the authorities in this series on the right of a highway traveler to climb over or go round a train or cars obstructing a crossing, see last paragraph of foot-note of *Lindler v. Southern R. Co.* (S. C.), 36 R. R. R. 334, 59 Am. & Eng. R. Cas., N. S., 334; first foot-note of *Edge v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 737, 61 Am. & Eng. R. Cas., N. S., 737; fourth head-note of *Curtis v. St. Louis, etc., R. Co.* (Ark.), 38 R. R. R. 167, 61 Am. & Eng. R. Cas., N. S., 167.

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by what route the plaintiff approached the crossing where he met with his injuries. What was set out with respect to this in the statement of claim was by way of inducement simply. The material allegations which defendant company was called upon to meet were that it had for an unreasonable length of time kept at rest a long train of empty coal cars upon Twenty-Fifth street, in the city of Philadelphia, thereby blocking Tasker street, which runs at right angles with Twenty-Fifth, and preventing travel thereon; that the boy, Edward Crowley, a youth of 10 years, accompanied by a brother two years older, while attempting to cross over upon the standing cars from one side of Tasker street to the other, and while upon the platform of one of the cars, was violently thrown from the car by the sudden and negligent starting of the train without signal or warning, with the result that he was seriously injured. Whether the train was actually at rest, and for what period of time, were matters in dispute; but these questions were for the jury on the evidence, and the findings with respect to them have ample support in the testimony. Twenty-Fifth street, running north until Tasker is reached, is an unopened street, and defendant company owns a fee therein to the extent of 30 feet in width, which it uses for its tracks. Whether north of Tasker this street is an open public thoroughfare does not appear, nor is it material. The boy, Edward Crowley, his companion, and another, the only witnesses who saw the occurrence, testified that the boys entered upon the cars on the north side of Tasker, at the crossing. Two other witnesses called by plaintiffs testified that after the boy had fallen and received his injuries he was found along the tracks some six feet or more south of the path on the south side of Tasker street. The train was moving north; and, since the boy was discovered immediately after the accident, the evidence suggests a contradiction as to the point where he entered upon the cars to cross; and it is argued that, if the entry was at the point where the boy was found, then it was on the premises of the defendant, not at the public crossing, and that defendant owed no duty to the boy at that place, except as it was shown that it had knowledge of his being on the cars.

With respect to this contention, it is only necessary to say that this inconsistency in the testimony, irreconcilable as it may seem, was matter which addressed itself to the jury. The boy's testimony was clear, direct, and positive, that he entered upon the cars at the public crossing on the north side of Tasker street; and in this he was supported by the only two witnesses who saw the occurrence. He was entitled to have the jury believe this testimony, if they would, notwithstanding two other witnesses called on his behalf testified to conditions subsequent which would seem to indicate that entry on the cars had been made from the south side at a point below the line of Tasker.

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Kohler v. Railroad Co., 135 Pa. 346, 19 Atl. 1049. In the case cited it is said: "If, on the whole evidence in behalf of the plaintiff, his own testimony is overthrown by that of his own witnesses, in such number and weight that the court could not support a verdict in his favor, then it would become the duty of the court to direct a nonsuit or a verdict. But such case should be clear and without doubt. If there is a doubt, it must go to the jury." The court clearly would have been without justifying reasons, had it withdrawn this case from the consideration of the jury.

But more than this—conceding that the crossing was attempted on the south side at a point some six feet from the south line of Tasker street—how can it be urged that such circumstance should defeat a recovery, except as the boy is to be regarded as a trespasser on the company's property? Can a railroad company, in disregard of the duty it owes to the public, block a crossing with a train composed of cars, each of which is more than 31 feet in length, be heard to say that, when one who, finding his way so blocked, steps aside from the crossing a distance of six feet to find an opening between the cars through which he may pass, he is a trespasser? Technically he may be a trespasser, but such technicality ought not and cannot be allowed to exempt the company from liability for injuries occasioned by its own negligence in failing to keep the public way open for the accommodation of the public.

[2] The action was in behalf of the injured boy, and in behalf of his widowed mother as well, and a separate amount was recovered for each. The right of a widowed mother to recover for loss of service of her minor child is not open to question since the decision of this court in *O'Brien v. Philadelphia*, 215 Pa. 407, 64 Atl. 551. It was there held that, under the act of June 26, 1895 (P. L. 316), a deserted mother has a right of action in such case. It follows, a fortiori, that the same right belongs to a widowed mother.

Into a discussion of what passed between court and counsel with respect to the points submitted on behalf of defendant, we must decline to enter, since the rulings themselves are clear of error. In view of this fact, discussion of the controversy would be most unprofitable. In what we have said we have given consideration to all the assignments.

We find no error in the record, and the judgment is affirmed.

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BEECH v. MISSOURI, K. & T. Ry. Co.

(Supreme Court of Kansas, June 10, 1911.)

[116 Pac. Rep. 213.]

Railroads—Accident at Crossing.*—A railroad track is itself a warning of danger to an approaching traveler, and it is the duty of one about to cross, who is competent to exercise care for his own protection, to use his faculties of sight and hearing in the manner of an ordinarily prudent person, and the omission to do so is an omission of ordinary care, which will bar a recovery for injuries resulting from a collision with a train, notwithstanding the negligence of the railroad company in failing to sound a whistle 80 rods from the crossing.

Railroads—Accident at Crossing—Duty to Look and Listen.†—The fact that the view of one approaching a railroad track is obstructed for a short distance requires the exercise of greater vigilance and care on his part to learn if there is a present danger in crossing, and it is incumbent on him to look again when he passes the obstruction and when an opportunity exists to look and listen for an approaching train.

Railroads—Verdict—Special Findings—Inconsistency.—The presumption invoked in support of the general verdict that the deceased looked and listened and otherwise exercised due care for his own safety is overcome by the special findings of the jury which show that if he had looked and listened, where there was an opportunity, he must have seen the approaching train, and could have saved himself.

Trial—Verdict—General and Special Findings—Inconsistency.—Where the general verdict of the jury is in favor of the plaintiff, but the special findings returned with the verdict show that plaintiff is not entitled to recover, judgment should be entered on the special findings in favor of defendant.

(Syllabus by the Court.)

Appeal from District Court, Neosho County.

Action by Elizabeth Beech, administratrix, against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. R. Cline and J. Q. Stratton, for appellant.*Jno. Madden and W. W. Brown*, for appellee.

*See second foot-note of *Chicago, etc., Ry. Co. v. Bennett* (C. C. A.), 38 R. R. R. 671, 61 Am. & Eng. R. Cas., N. S., 671.

†See foot-note of *New York Cent., etc., Co. v. Maidment* (C. C. A.), 32 R. R. R. 681, 55 Am. & Eng. R. Cas., N. S., 681; first two foot-notes of *Lindsay v. Pennsylvania R. Co.* (N. J.), 35 R. R. R. 755, 58 Am. & Eng. R. Cas., N. S., 755.

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JOHNSTON, C. J. This was an action by Elizabeth Beech to recover damages from the Missouri, Kansas & Texas Railway Company for the alleged negligent killing of her husband, Adam Beech, at the intersection of a highway and the railroad, about a mile southwest of Walnut, Kan. Adam Beech was a farmer, about 68 years of age, and while going home, driving a horse attached to a buggy, at 9:10 o'clock p. m., on November 13, 1907, he was struck by a passenger train of the railway company at the crossing, and was instantly killed. The train was behind time, and was traveling at the rate of 50 miles per hour when it collided with Beech. Approaching the crossing from the southwest, the train came over a hill through a cut, which was about one-half mile from the crossing, and from that point there is a downgrade of the track extending over the crossing and to the town of Walnut, a distance of about one mile and a half. For some distance near the crossing the ground is low, and the grade of the railroad is from eight to ten feet high. There is another crossing near the top of the hill, about 2,600 feet from the point of the collision, where the whistle of the locomotive was sounded, but no whistle was sounded or other signal given within 80 rods of the crossing where Beech was killed.

The principal ground of negligence relied on was the failure of the railroad company to give the statutory signals on approaching the crossing. It was alleged and found that the train coasted downgrade from the top of the hill, without steam, in a comparatively noiseless manner, at the rate of 50 miles per hour. On the other hand, it was found that the night was clear, the moon was shining, and a light breeze was blowing. The locomotive was equipped with an electric headlight, which was burning on the night in question, and any one standing on the track could have seen the train 3,200 feet from the crossing. The fill on which the track was laid near the crossing was about 8 feet high, while the light on the locomotive was 14 feet above the track. The railroad company charged that the deceased was guilty of contributory negligence in driving upon a crossing, with which he was familiar, in front of a coming train, which he either saw, or could have seen, had he looked. The jury returned a general verdict awarding damages to the plaintiff in the sum of \$4,000 and also a large number of special findings. There were findings, somewhat general in character, that the railroad company was negligent in not sounding the whistle 80 rods from the crossing, and that Adam Beech was not guilty of contributory negligence. Other findings gave the conditions at the crossing, the kind of weather, the character and speed of the train, the condition and movements of Beech, and how far the train could be seen from different places as a person approached the crossing. Motions were made to set aside the ver-

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dict and grant a new trial, and for judgment on the special findings, and also to set aside the special findings. The court set aside the general verdict and awarded judgment in favor of the railroad company on the special findings. The other motions were necessarily overruled. Appellant alleges error, and the question presented for decision is, Do the special findings show that Adam Beech was guilty of contributory negligence?

In addition to the facts stated, the jury found that Adam Beech approached the crossing at the rate of three miles per hour, driving a gentle well-broken horse; that he had lived within three miles of the crossing for 24 years, and during that time had been familiar with the crossing and the conditions surrounding it. His faculties of sight and hearing were good. The railroad was straight, and a person at the crossing could have seen the headlight of the engine, as it approached from the southwest one-half of a mile away, but there was a hedge, as well as some cornstalks and weeds, which, for a short distance, partially obscured the view of one approaching the track from the north. It was found that a person when he was 20 feet north of the track could have seen the light of the locomotive a distance of 3,200 feet. When he was 30 feet from the track, he could have seen the train about 2,640 feet away. When 40 feet from the track, he could have seen the train 1,600 feet away. When 50 feet from the track, he could have seen it 480 feet away. From that point to one about 130 feet north the train could be seen 1,800 feet away and at 150 feet from the track the train was visible 1,320 feet away while at 210 feet from the track it could have been seen 1,800 feet away. When he was 48 feet away, he could have seen the train, but between that point and one 70 feet back the obstructions mentioned interfered with the view. A fill was made on the highway in order to cross the track, which was from 8 to 10 feet above the level at that point. The length of this fill or grade was not found by the jury, but in appellant's petition it is alleged to be 40 feet long and the jury found it to be 20 feet wide.

While the general verdict, and some conclusions drawn by the jury, are to the effect that the deceased was free from contributory negligence, the ultimate facts found show that if he had exercised the care for his protection, which the law requires, and had used his faculties of sight and hearing before going upon the crossing, he could have seen and averted the danger and collision. There was nothing to prevent him from seeing the coming train when he was 48 feet back from the track. No one saw what his action was at this point, but the night was clear, his horse was gentle, he was familiar with the crossing, his sight and hearing were good, and, if he took the precaution to look, he necessarily saw the train when he went upon the track, and, if he failed to look and ventured blindly on the

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track in front of the train, he failed to exercise due care. It was decided in *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, that: "It is the duty of a person about to cross a railroad track to make a vigilant use of his senses as far as there is an opportunity, in order to ascertain whether there is a present danger in crossing. A failure to listen or look when by taking this precaution the injury might have been avoided is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury." Syllabus, § 2.

[1] A railroad track is itself a warning of danger to all who go upon it and one about to cross should look and listen for a train before attempting to cross, and an omission to do so is an omission of ordinary care which will defeat a recovery. *Railway Co. v. Wheeler*, 80 Kan. 187, 101 Pac. 1001. The deceased was familiar with the crossing and necessarily recognized it and the attending risk in passing over it.

[2] While there was a short distance of the approach in which his view was obstructed, that fact required greater care and vigilance on his part, and it was incumbent on him to look again when he passed the obstruction and where he could have obtained a clearer view of the track. *A., T. & S. F. Rd. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *A., T. & S. F. Rd. Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278; *C. R. I. & P. Ry. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246; *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *Railway Co. v. Wheeler*, 80 Kan. 187, 101 Pac. 1001; *Johnson v. Railroad Co.*, 80 Kan. 456, 103 Pac. 90. When the deceased passed the obstruction, he was on level ground, 48 feet from the track, and the lights of the train were in plain view. If he was giving attention to his situation when he was 40 feet from the track, the danger of proceeding must have been apparent, and there was ample opportunity to protect himself. Even when 30 feet from the track, and the glare of the headlight was upon him, there was still an opportunity to save himself, although he was then on a high grade, and there was more or less risk of injury in turning aside. But even at this point ordinary prudence required that he stop on the approach, turn aside, or back off, rather than to run a race with the engine. It is said that there is nothing here to show that the deceased did not look and listen when he went upon the track, but the detailed findings show that, if he had looked and listened when he should, he would have seen the train and the danger of crossing. In *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583, the person injured at a crossing stated that she did look and listen for a coming train and saw none, but, as there was nothing to prevent her seeing the train if she had looked, the court held as a matter of law that she was guilty of contributory negligence on the theory

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either that she did not look and listen, as the law requires, or, if she did look and listen, she must have seen the train in time to have avoided the collision. It is said that the presumption is that the deceased looked and listened and otherwise exercised due care for his safety, but this presumption is overcome by the findings which disclose that, if he had looked and listened, where there was opportunity, he must have seen the approaching train. *Bressler v. Railway Co.*, 74 Kan. 256, 86 Pac. 472; *Rollins v. Railroad Co.*, 139 Fed. 639, 71 C. C. A. 615. The duty of the traveler to look and listen is absolute where an opportunity exists, and, as has already been suggested, "it is not enough for a traveler to look where a train cannot be seen or to listen when it cannot be heard. Nor will it suffice that one has looked some distance away from the crossing when a view on a closer approach would have revealed the danger." *Railway Co. v. Wheeler*, *supra*, 80 Kan. 191, 101 Pac. 1003.

[3] Some of the findings in regard to what was done or seen by deceased, as he approached the crossing, are based on presumption alone, as there was no eyewitnesses to what occurred until the engineer saw him come on the track just as the train reached the crossing. Although other persons who were further away from the train heard the whistle sounded at the hill crossing, which was half a mile from the one where the collision occurred, and also heard the rumble and noise of the train as it approached, it must be assumed that appellee failed to give the statutory signal 80 rods' from the crossing and that it was guilty of negligence, but on the facts found by the jury there was nothing to prevent the deceased from seeing the approaching train and saving himself from injury. As we have seen, it is an unbending rule of law that if one, competent to exercise care for his own protection, goes upon a track in front of an approaching train without looking or listening, it is contributory negligence. One who sees a closely approaching train and drives on the crossing in an attempt to pass over ahead of the train is likewise guilty of contributory negligence that will bar a recovery for the injury and loss resulting from the collision.

[4] The ultimate facts specially found by the jury must prevail over the general findings, and our conclusion is that the special findings justified the decision of the trial court awarding judgment for appellee.

The judgment is affirmed. All the Justices concurring.

TIETZ v. GRAND TRUNK RY. CO. OF CANADA.

(Supreme Court of Michigan, June 2, 1911.)

[131 N. W. Rep. 710.]

Trial—Question for Jury—Negative and Positive Evidence.*—The testimony of witnesses observing an engine running backwards on a track at night that they observed no light on the engine except light from the fire box, and that they heard no signals as the engine approached a crossing, though they listened for them, was not purely of a negative character; and, though other witnesses testified positively that a hand lantern hung on the tender, and that signals were given, the issue of negligent operation of the engine was for the jury.

Railroads — Collisions — Contributory Negligence—Question for Jury.—Whether a traveler injured in a collision with an engine at a railroad crossing was guilty of contributory negligence held, under the evidence, for the jury.

Error to Circuit Court, Macomb County; Harvey Tappan, Judge.

Action by John Tietz, by Albert Tietz, his next friend, against the Grand Trunk Railway Company of Canada. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, BLAIR, STONE, McALVAY, and BROOKE, JJ.

Harrison Geer, for appellant.

William T. Hosner (John A. Weeks, of counsel), for appellee.

STONE, J. John Tietz, a minor, who was just past 17 years of age at the time the injury, complained of occurred, brought suit, by next friend, against the defendant to recover damages as compensation for personal injuries sustained by him through the collision of the buggy in which he was riding along the Hadley road, so called, in the township of Armada, Macomb county, at a point where said highway crosses the Michigan Air Line Railroad, a single-track railroad operated by the defendant, and the engine and tender running backward in a westerly direction over such railroad at substantially 8 o'clock on the evening of November 4, 1908. Hadley road extends in a northeasterly and southwesterly direction, and the railroad track also extends in the same direction, but the highway runs much more to the north

*See foot-note of *Anspach v. Philadelphia, etc., Ry. Co. (Pa.)*, 35 R. R. R. 91, 58 Am. & Eng. R. Cas., N. S., 91; foot-note of *Louisville & N. R. Co. v. O'Nan (Ky.)*, 34 R. R. R. 528, 57 Am. & Eng. R. Cas., N. S., 528; third head-note of *Slattery v. New York, etc., R. Co. (Mass.)*, 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795.

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and south than does the railroad. There was one house along this highway, which was located substantially 300 feet north of the point of intersection of the highway with the railroad, and upon the east side of the highway. Passing south from the house along this highway for the first 150 feet, or thereabouts, it is level with the adjacent land. Then there had been a cut making an embankment on the east of the highway of about six feet in depth, and it extended to within about 40 feet of the northerly rail of the defendant railroad. There was on the westerly side of the highway, and north of the track, several acres of elm trees. The land upon which these trees stood was much lower than the highway. The railroad for about 30 rods east of the Hadley road crossing runs through a cut of about the same depth as is that along the easterly side of the highway. The engine in question left Jackson pulling a stock train by way of Lennox for Detroit. The train reached Romeo at substantially 6:30 o'clock. After doing some switching there, the engineer discovered that he did not have sufficient water in the tank to haul the train to Armada, the next station east. There being no means of taking water at Romeo, the conductor cut off the six forward cars from the remainder of the train, and the engineer, fireman, and forward brakeman went to Armada with so much of the train. Arriving there, these six cars were placed on a siding. The tank was filled with water, and they started to return to Romeo for the remainder of the train at about 7:45 p. m. There being no turntable at Armada, it was necessary, in going from Armada to Romeo, that the engine and tender run backward. The fireman placed an ordinary railroad hand lantern upon the westerly end of the tender. It threw a white light. There were brackets upon the manhole into which to slide said lantern, which brackets held it securely. It is claimed by the defendant that the lantern was so placed in compliance with the rule of the company.

In view of the fact that the plaintiff is the only witness who testified to the circumstances surrounding the collision, we deem it proper to insert the substance of his testimony as to the injury. Testifying as to the approach from the north, and speaking first of the point 150 feet from the crossing, the plaintiff said: "You can see back I should say. I don't know about the night, but in the daytime you can see from the top of the hill back east maybe about 40 rods from the top of the hill. You cannot see anything to the west on account of the woods at that point. When I reached that point, I knew the railroad track was there, and I really didn't expect a train at that time, but I looked out for it as I always do when I go across the track. I was alone. The only thing I was thinking about was that the track was there and I was coming to the crossing of it at that time. I was driving a farm horse which worked in a

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team. I had a top buggy with the top half down. The top would not interfere at all with my looking ahead, and I could see both ways. I was wearing a little skull cap. There was no earlap on it. I had on my coat. This was turned up. It wasn't tight to my ears, and wouldn't interfere with my hearing in any way. When I was within 150 feet of the track, I stopped my rig over the hill. I didn't see or hear anything, so I started my horse and let him walk. I came to a complete stop, and looked in both directions as far as I could see. I could see nothing and hear nothing. I heard no bell or whistle from the locomotive or rumbling of approaching train. After leaving that point, I proceeded along the highway towards the railroad track. I walked my horse the distance from that point to the railroad track. All that I had on my mind was that I was going to cross the track there. When the horse's head was within eight or ten feet of the track, I stopped the horse, leaned ahead in the buggy, and looked both ways and listened. I saw and heard nothing, so I started the horse and drove on, and just as I got on the track is the last thing I remember. I was struck and became unconscious. I stopped when the horse was eight or ten feet from the track just long enough to look both ways. I think that I would be back six or seven feet further when I was sitting in the buggy, possibly 14 or 15 feet from the north rail. When I stopped that last time, the horse was in the center of the highway, and, if it had been daytime, I could have seen a thousand feet in either direction from that point. There was nothing to obstruct the view except the fence and the posts, and they would not obstruct the view of one standing in the position I was. As you go further north the bank and the trees obstruct the view so that you could not see in either direction. I looked in both directions very carefully and listened very carefully. I observed nothing at all. The only thing I saw of the train that struck me was just a kind of a flash. It kind of scared me for a minute. That was all I saw. I didn't see anything of any light. I didn't see any headlight or lookout. When I regained consciousness, I was down beside the cattle guards."

The buggy was literally smashed to pieces and strewn about the track. The horse was found dead the next morning, about 75 feet from the crossing, on the south side of the track. The plaintiff was so badly injured that it was necessary to amputate his left leg, and he was otherwise injured. The plaintiff lay there unconscious until the return of the engine and its train, when it appears that some portion of the buggy was thrown against his face, arousing him, after which he made an outcry, and attracted the attention of a Mr. Farrand and family, who lived in the house north of the crossing already referred to. The plaintiff testified that it was a very dark night, and that the wind was blowing from the northwest; that the branches

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of the trees came out near the railroad track and highway. Plaintiff testified that before the accident he weighed 135 pounds, was in good health, and that his eyesight and hearing were good. He further testified, on cross-examination, referring to the Farrand house: "The road in front of the house is level with the surface of the ground; and, when you get within 150 feet south of the Farrand house, the road commences to decline. The cut starts gradually and grows deeper. I don't think that at any point after where I stopped at 150 feet back, if I had stopped again, I could have looked east and seen the train coming until I got down to the track. That is the reason I didn't stop because I knew I couldn't see it on account of the bank. I think that, when I stopped the horse, his feet were about eight or ten feet from the north rail. I was in the buggy. The nose of the horse was within eight or ten feet of the rail, so his feet were probably ten feet from the track. I stopped there. I am not sure that as I sat in that buggy my head was six feet above the surface of the ground. It was just an ordinary buggy, and I think my eyes would be about six feet from the ground. I never measured it. I remained there, stopped there just long enough to look both ways up and down. I could not see anything, so I went on. I was careful to bring the horse to a stop so that the buggy wouldn't make any noise. There was some wind. I think I looked to the west first. I am not sure. I looked both ways. I looked very carefully. My horse was standing still. I saw no lights, and didn't hear the rumbling of any train. I drove forward until my horse must have been right on the track. He walked, and, just as he got on the track, he was struck by the engine. I didn't see or hear anything of the train until the collision occurred. I never saw the engine at all until it came right against my horse. He was going just at an ordinary walk. From the time I stopped him about 150 feet back from the crossing I just let him walk down to the track. I trotted him until he got to that hill in front of Farrand's house. I knew that was a good place to look, and I could have seen if there was anything coming. I also knew that from that time up until I got down near the track I could not see anything at the east on account of the bank. That is the reason why I drove close to the track so as to be in a position to see. I say that at the point where I stopped the second time I could have seen a train in the daytime a thousand feet away."

When this engine and tender were east of the Hadley crossing, they were heard by several persons.

Arthur Farrand, who lived in the house above mentioned, and his wife, had retired for the night. They occupied a bedroom situated at the southeast corner of the house on the ground floor. When the engine and tender were 50 or 60 rods east of the

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crossing, Mr. Farrand heard them. He got up, raised the curtain, and looked out of the window, as the noise continued to grow plainer. When the engine and tender were about 20 rods from the crossing, he observed that the fire box door was open. The reflection from the fire box lighted up the engine and tender. He observed that they were backing west. He testified that he saw no light upon the westerly end of the tender, and no headlight upon the engine. He did, however, observe the engine and tender by the reflection thrown upon them from the fire box, the door being open until the engine was within five rods east of the crossing. He testified: "During the time that the train was being observed by me, I didn't hear any whistle or bell. I was listening for those signals. If any whistle or bell had been blown or sounded, I would have heard it. I was listening real closely. I only heard the coming. It was something unusual, and we were listening to see what it was." Mrs. Farrand testified that she did not get out of bed, but sat up, and that for some minutes before she saw the engine and tender pass her bedroom window she heard them approaching. She observed the reflection from the fire box as the engine passed her bedroom window.

Claud Webster, a brother-in-law of Mr. Farrand, was with his wife spending the night there. They occupied a bedroom at the northwest corner of the house on the ground floor, which bedroom was separated from the parlor by two folding doors. He testified that he was preparing to retire for the night and stood near these folding doors at the time he heard the rumbling noise of the approaching train. He stepped into the parlor, looked out of the bay window, and then saw the engine and tender. He testified that it was within 30 to 35 rods east of the crossing when he first heard it, and that at the time he first saw the engine it was about five rods from the crossing. As the train passed the crossing Mr. Webster saw no headlight burning; that is, he saw no light on the front end of the train as it was moving. He is very positive that he heard no bell or whistle from the time when he first heard the noise of the train.

One Frank Millard, a farmer living three-eighths of a mile southwest of the Hadley crossing, and about 80 rods south from the railroad track, testified that he was at the northeast corner of his house at the time the engine and tender went west. He testified that he heard the engine and tender when near the Hadley crossing, and that, when he first saw them, he observed a flash of light. He described it as a "kind of reflection from the fire box when they put in a fire. I did not observe any other lights."

Two young men, Carl and Gilbert Ganfield, who were from a mile and a half to two miles west from the Hadley crossing, observed the engine and tender as they passed west near them.

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The first of these witnesses, Carl, testified that he did not notice whether the train had a headlight on or not. He did not observe any. He simply heard the noise, saw the light, and knew it went by. He heard no whistle or bell. Gilbert testified that the light which attracted his attention looked as though it was from the open fire box; that the train passed within 10 rods of him, and he observed no lights upon the train besides the light from the fire hole; that he had a side view of the train, and observed no light before the train passed. He heard no bell, whistle, or signal given by the engine. The plaintiff's witnesses above mentioned testified that it was a dark night, and a strong wind was blowing from the northwest.

Dr. Traphagan, the physician, who was called about 11 o'clock at night to attend the plaintiff, and who traveled from the village of Armada, some two or three miles distant, testified that it was a dark night. On the other hand, the person in charge of the United States weather bureau at Detroit testified from his records that the moon was three-quarters full, and that it was a clear night in Detroit, and that, under existing conditions, there would be little or no cloudiness in the southeast portion of Michigan; and that it followed from the existing conditions that the night at Armada was clear. This testimony was corroborated by the person in charge of the United States weather bureau office at Grand Rapids. The engineer, fireman, and brakeman in charge of the engine and tender testified that it was a clear, bright night, and yet they did not know that any accident had happened until the next morning; and, although they went to Romeo after the collision and returned an hour later, they neither observed the wreck of the buggy, the plaintiff in his injured condition, nor the dead horse lying nearby.

The engineer, fireman, and brakeman testified that the engine was not running to exceed 17 miles an hour. Two witnesses produced by the plaintiff testified that in their judgment the engine was running 40 to 50 miles an hour.

Upon the subject of signals, the engineer testified that as he started to go back from Armada to Romeo he set the engine bell ringing, that this was an automatic bell, and that the bell continued to ring all the way from Armada back to Romeo, and until they stopped at Romeo. With reference to the whistle the engineer testified: "I blew the whistle after leaving Armada for Romeo at the different crossings. A crossing whistle is two long and two short blasts. They are blown at the whistling posts. I don't know the Hadley crossing by name, but they said the second crossing the other side of Armada. I don't know these crossings by name. The whistling posts tell us where these crossings are, and I blew at or near the whistling post." The fireman testified to the ringing of the bell, that it was started when they left Armada, and it was ringing when

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they stopped, and the lantern was still burning. As to the blowing of the whistles, this witness testified that they could be heard eight or ten miles, that he could not say how many times the engineer blew it between Armada and Romeo, but he thought he blew it every time he came to a crossing, but the witness would not state positively whether he blew it or not every time he passed a crossing between Armada and Romeo; that he had a recollection of the engineer blowing the whistle several times, but the witness was busy about his duties throwing on coal from time to time. The brakeman's testimony about the ringing of the bell was substantially the same as that of the fireman.

At the close of the testimony counsel for defendant moved the court to direct a verdict for the defendant, for the reasons that no negligence of defendant had been shown, and that plaintiff was guilty of contributory negligence. This was refused and an exception taken, and the case was submitted to the jury by the trial court. As stated by defendant's counsel in his brief, the negligence of which it is claimed defendant was guilty, and which question the trial judge submitted to the jury for their determination, it is well set forth in the following language: "You are further instructed under the evidence that if the engine in question sounded the crossing whistle at a proper distance east of the crossing, that the bell on such engine was ringing as it approached the crossing, and that a white light in the shape of a lantern was upon the west end of the tender, then the defendant company was guilty of no negligence in the premises, and your verdict should then be for the defendant." The jury returned a verdict for the plaintiff for \$5,000. There is no claim that this verdict was excessive, if the plaintiff was entitled to recover. There was no motion for a new trial. The defendant has brought the case here upon bill of exceptions, and by assignments of error has presented the questions already mentioned.

(1) It is the claim of the defendant that the evidence fails to show that the defendant was guilty of any negligence, and that the trial judge should so have charged the jury as requested. (2) That the plaintiff was guilty of contributory negligence as matter of law, and that the trial judge should, as requested, so have instructed the jury.

The plaintiff contends that the testimony fairly tends to show the following significant facts: (1) That it was a dark night. (2) That the train was running backwards without a headlight. (3) That there was no lookout or watch ahead. (4) That there was an excessive rate of speed. (5) No warning whistle or bell.

The plaintiff contends that the testimony to establish these facts was positive in its nature, and not negative.

We have already indicated that the plaintiff and five of his witnesses testified that it was a dark night; some of them say

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a very dark night. This was disputed by an equal number of witnesses on behalf of the defendant, and the weather men from Detroit and Grand Rapids. That the train was running backwards and without a headlight, except the hand lantern hung on the tender, and that there was no lookout or watch ahead, does not seem to be disputed. The proposition that the engine was running at an excessive rate of speed is disputed, the plaintiff having shown by two witnesses whose testimony is criticised by the defendant that the train was running from 40 to 50 miles an hour, while the engineer, fireman, and brakeman testified to the lesser rate of speed, which we have alluded to. The fifth proposition, as to the statutory whistle and bell, is disputed; the plaintiff and several of his witnesses testifying that no signals were given, or that they heard no signals while listening for them, while the defendant's witnesses in charge of the engine testify positively in regard to the ringing of the bell, but this cannot be said of the sounding of the whistle, for really the engineer in charge is the only person who testifies positively as to the sounding of the whistle, and he only spoke as to all crossings, not knowing this crossing from the others.

[1] (1) Upon the first point urged by defendant, it is strenuously insisted by counsel that the testimony which the plaintiff introduced, as to whether there was a light upon the tender at the time it approached the Hadley crossing, and as to whether the whistle was sounded at a proper distance, and the bell rung, was purely of a negative character, the witnesses being either in no position to observe signals or paying no heed whatever, and it is urged that the cases of *Stewart v. Michigan Central R. Co.*, 119 Mich. 91, 77 N. W. 643; *Britton v. Railroad Company*, 122 Mich. 359, 81 N. W. 253, and *Bond v. Railroad Company*, 128 Mich. 577, 87 N. W. 755, are conclusive and controlling upon this point. We have examined these cases with considerable care, and are unable to agree with defendant's counsel in this contention. It should not be forgotten that in the instant case the injury occurred in the nighttime. The case *Stewart v. Michigan Central R. Co.*, supra, arose from an injury which occurred by daylight, and the headnote specifically points out the distinction between that case and this: "In an action for the death of plaintiff's intestate in a collision at a railroad crossing, three of the train crew testified positively to the giving of the proper crossing signals, and were supported in this respect by two of plaintiff's witnesses. The only testimony relied upon by plaintiff as raising an issue for the jury was that of certain witnesses who testified that they did not hear the signals, but who admitted that they were occupied with other matters, and were not in positions favorable to hearing them, and the confused and uncertain testimony of a child 11 years old. Held, that the jury should have been instructed that the signals were given." In

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Britton v. Railroad Company, supra, the headnote upon this branch of the case is as follows: "The testimony of the occupants of a closed carriage, struck by a train at a railroad crossing, that, although they stopped two rods from the track and listened, they heard no crossing signals, does not rise to the dignity of evidence, so as to take the question to the jury where all the members of the train crew, and a bystander, an entirely disinterested witness, positively testify that the signals were given, and sated the reason for their recollection." In *Bond v. Railroad Company*, supra, the headnote is as follows: "Where, in an action for injuries caused by a collision at a railroad crossing, the negligence alleged was a failure to give the statutory signals, and there was the testimony of seven witnesses, including those in charge of the train, that the signals were given, as against the sole testimony of the plaintiff and a woman partially deaf, who, at the time of the accident, was sitting in a closed carriage, and whose testimony was in several respects contradictory to that given by her on a former trial, a motion to set aside, a verdict in her favor, and grant a new trial, on the ground that the verdict was against the weight of the evidence, should have been granted." It seems to us that these cases are readily distinguishable from the case we are considering, and that the question of the negligence of the defendant was properly submitted to the jury. In our opinion the case more clearly resembles that of *Lonis v. Lake Shore, etc., R. Co.*, 111 Mich. 458-460, 69 N. W. 642, 643. In that case Mr. Justice Grant said: "Five witnesses for the plaintiff swear positively that the signals were not given, and give their reasons why they so testified. One other witness, John Williams, testified that he was 'looking right at the engine,' and that he did not hear any bell or whistle. On cross-examination he said 'he did not think he was thinking anything at all about any train coming, that his attention was not called directly as to whether the train whistled or whether it did not, although, being out of doors, he would have heard it probably if it had whistled; that he would hardly think the bell would ring without he noticed it at such a time as that—in fact, he was talking about it right away.' On the part of the defendant, 18 witnesses testified positively that the signals were given. We do not think there was negative testimony to which the request would have been applicable. The only testimony to which that term could possibly be applied was that of Williams. But he said that he was looking at the engine, was out of doors, and within hearing distance. It seems improbable, as he testified, that he would not have heard them under these circumstances. The situation before the jury was one of positive testimony against positive testimony, and their verdict depended upon which they believed. They have said by their verdict that they believed the five witnesses for plaintiff, and did not believe the 18 for the de-

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fendant. If there was any remedy for the defendant, it lay with the circuit judge, who saw the witnesses, and was better able than we are to determine whether the jury disregarded the rule as to preponderance of evidence, so as to justify him in granting a new trial." *Crane v. Railway Company*, 107 Mich. 511, 65 N. W. 527; *Hinkley v. Railway Company*, 162 Mich. 546, 127 N. W. 668.

[2] (2) Upon the question of contributory negligence, defendant's counsel says that "the case differs from the usual crossing accident, in that there is no testimony as to the conduct of plaintiff as he approached the crossing in question other than is given us by him. We are compelled therefore to accept as true such version of what he did, but, should this show him to have been guilty of contributory negligence, then there was, under the decisions of this court, no question for the trial judge to submit to the jury." And he cites in support of his position *Davis v. Railroad Company*, 20 Mich. 105, 4 Am. Rep. 364; *Jenks v. Colwell*, 66 Mich. 420, 33 N. W. 528, 11 Am. St. Rep. 502; *Karrer v. Railway Co.*, 76 Mich. 400, 43 N. W. 370; *Brady v. Railroad Company*, 81 Mich. 616, 45 N. W. 1110. These cases do not seem to us to be controlling of the question here. In *Davis v. Railroad Company*, *supra*, this court held that when the plaintiff on the stand as a witness states his case so as to show that he has no cause of action, and there is no attempt at a qualifying explanation by other witnesses, he has no ground of complaint if the court charge the jury that no recovery is justifiable. In *Jenks v. Colwell*, *supra*, it was held that, where the undisputed testimony of the plaintiffs in the case establishes a fact affecting their right to recover, it is error to submit such fact to the jury, as a question in dispute under the testimony. In *Karrer v. Railway Co.*, *supra*, this court said: "Where there is conflicting testimony, and the plaintiff's case is made out, unless disbelieved, it is proper to let the jury decide the controversy; but they should not be allowed to give a plaintiff a verdict against his own admissions and his own case as he makes it out, with no other reliance." In *Brady v. Railroad Company*, *supra*, this court ruled that a plaintiff is held to have been guilty of contributory negligence in attempting to cross a railroad track at a crossing so obstructed by intervening objects that he could not see a train approaching from one direction until he was within 20 or 25 feet of the crossing, and then only for a few rods up the track, without first stopping his team and taking some precaution to see if a train, which he knew was about due, was approaching. We cannot agree with counsel that the above authorities are applicable in this case upon the question of contributory negligence. If the plaintiff's testimony is to be believed, he was guilty of no negligence. In our opinion whether he testified truthfully or not was a fair question for the jury. If

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it was a dark night, and if the wind was blowing as he claims it was at the time, if there was no light, and if no statutory signals were given, it is difficult to understand why the plaintiff had not the right to suppose it was safe for him to cross the railroad track, after he had stopped, and looked and listened, as testified to by him.

In our opinion the case was properly submitted to the jury upon the questions of fact involved, and, after examining the entire record with care, we are unable to discover any reversible error. The judgment of the circuit court is therefore affirmed.

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(Court of Appeals of Kentucky, June 8, 1911.)

[137 S. W. Rep. 1066.]

Courts—Controlling Decisions—Decisions of Federal Courts.—The authority of the federal courts in cases within their jurisdiction is paramount to that of the state courts; and, where the point in issue involves a federal question, the state courts must follow the decisions of the federal Supreme Court.

Courts—Controlling Decisions—Decisions of Federal Courts.—Where an action is brought in a state court having jurisdiction of the subject-matter and of the parties, its right to hear and determine the action should not be surrendered, in the absence of a plain ruling adverse to its jurisdiction by a court of superior authority.

Removal of Causes—Jurisdiction of State Court.—Where a state court in which an action is pending has original jurisdiction of the subject-matter of the action, and the federal court does not have such jurisdiction, it is for the state court to determine the question of removal to the federal court.

Removal of Causes—Jurisdiction of State Court.—Where an action sought to be removed from a state court to a federal court might have been brought in the federal court, the filing of a removal petition with a sufficient bond operates to transfer the case to the federal court.

Removal of Causes—Jurisdiction of State Court.—Where a petition against nonresident and resident defendants states a good joint cause of action against all, and a petition for removal of the action to the federal court is filed on the ground that the resident defendants were fraudulently joined merely to defeat a removal of the case, it is for the state court to determine as a matter of law from the petition and the petition for removal whether the action shall be removed or not, unless the action is one that could on the averments of the petition have been brought in the federal court.

Removal of Causes—Petition for Removal—Hearing—Affidavits.—Where a petition for the removal to a federal court of an action in

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a state court against nonresident and resident defendants on the ground that the resident defendant was fraudulently joined merely to defeat removal is accompanied by supporting affidavits, plaintiff may file controverting affidavits, and the state court may then pass on the question for itself whether the action shall be removed.

Removal of Causes—Fraudulent Joinder of Resident Defendants—

Power of Court.—Where a state court, on the filing of a petition for the removal to the federal court of an action against resident and nonresident defendants on the ground that the residents were fraudulently joined to defeat removal, declines to order a removal either on the petition alone or on accompanying affidavits, the case must go on for trial, but the nonresident defendant may, on the conclusion of plaintiff's evidence, or after the close of all the evidence, renew the application for removal, and the state court on finding that there was a fraudulent joinder, may remove the action; otherwise, not.

Removal of Causes—Grounds—Jurisdiction of State Court.*—A petition in an action in a state court brought by a resident against a foreign railroad corporation, and its resident servants, for the negligent death of a person struck by a train at a street crossing in the state, which states a cause of action against all defendants, states a cause of action which could not have been brought in the federal court; and, where the defendants were joined in good faith, the refusal to remove the cause to a federal court on the application of the corporation was proper.

Railroads—Collisions—Crossings—Negligence—Evidence.—In an action for the death of pedestrian struck by a train at a street crossing, evidence held to support a finding that, if a lookout had been kept by the fireman, the accident could have been avoided.

Railroads—Operation of Trains—Duty to Keep Lookout.†—Where a train when it started from a depot was within a few feet of a much traveled street in a city, and the engineer, though keeping a sharp lookout, could not see persons at the street crossing approaching or on the track on the fireman's side after the train started, it was the duty of the fireman to keep a lookout, and his failure to do so could not be excused on the ground that it was necessary for him to look back to see whether the train was clearing the station without injuring passengers, and to be ready to receive signals in case of danger; the train being equipped with a full crew, able to exercise care to see that passengers boarding or alighting were not injured by negligence of the carrier.

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see last foot-note of *Ward v. Pullman Car Corp.* (Ky.), 31 R. R. R. 548, 54 Am. & Eng. R. Cas., N. S., 548; foot-note of *Eastin & Knox v. Texas & P. Ry. Co.* (Tex.), 24 R. R. R. 508, 47 Am. & Eng. R. Cas., N. S., 508.

†See last foot-note of *Virginia-Carolina Ry. Co. v. Clawson* (Va.), 38 R. R. R. 134, 61 Am. & Eng. R. Cas., N. S., 134; extensive note, 37 R. R. R. 429, 60 Am. & Eng. R. Cas., N. S., 429.

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Railroads—Operation of Trains—Duty to Keep Lookout.—The failure of the fireman to keep such a lookout could not be excused on the theory that he could not anticipate that pedestrians would step from a place of safety onto the track in front of a moving train, because it is such negligence that trainmen approaching crossings must anticipate and provide against.

Railroads—Operation of Trains—Duty to Keep Lookout.—The duty of the fireman to keep such a lookout was not diminished by the fact that the engine bell was ringing, or that the crossing gates were down.

Railroads—Collisions—Negligence—Liability of Trainmen.—Where a train when it started from a depot was within a few feet of a much traveled street of a city, and the engineer, though keeping a sharp lookout, could not see persons at the street crossing approaching or on the track on the fireman's side after the engine started, the negligence of the fireman to keep a lookout was a negligent failure to perform an affirmative duty, and was actionable negligence.

Railroads—Collisions—Negligence—Last Clear Chance.†—The negligence of a pedestrian struck by a train at a crossing does not relieve the railroad company from liability for her death, where, after discovering her peril, the trainmen could have avoided the accident by ordinary care.

Railroads—Collisions—Negligence—Evidence.—In an action for the death of a pedestrian struck by a train at a street crossing, evidence held to justify a finding that decedent's peril could have been discovered if the fireman had performed his duty of keeping a lookout, and that, after the discovery of such peril, the accident could have been avoided by the fireman and engineer exercising ordinary care.

Death—Action for Death—Damages—Excessive Damages.—Where, in an action for the death of a woman 45 years old, the evidence was conflicting on the issues whether the decedent had tuberculosis, and whether her death occurring several months after the injuries received was the result of the injuries or of the disease, and the issues were properly submitted to the jury, a verdict for \$5,000 will not be disturbed as excessive.

Witnesses—Competency—Husband and Wife.—In an action for the negligent death of a wife, the husband is competent to testify as to her condition when he saw her at the hospital after the accident and subsequently thereto.

Appeal from Circuit Court, Clark County.

Action by Celia Bank's administrator against the Chesapeake & Ohio Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

†Fifth foot-note of Illinois Cent. R. Co. v. O'Neill (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99; first foot-note of United, etc., Co. v. Ward (Md.), 38 R. R. R. 67, 61 Am. & Eng. R. Cas., N. S., 67.

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*Shelby & Shelby and Pendleton, Bush & Bush, for appellants;
Jouett & Jouett and A. Floyd Byrd, for appellee.*

CARROLL, J. In this action by the administrator of Celia Banks to recover damages for her death alleged to have been caused by the negligence of the appellant railway company and its employees, a number of reasons are presented by counsel for the company why the judgment in favor of appellee against it should be reversed. But, before entering upon a discussion of the facts, and the errors alleged to have been committed during the trial, we will dispose of the question raised—that the case should have been removed to the federal court on the motion and petition of the appellant company, which was made and presented in due time and form. The appellant company is a Virginia corporation, and the suit was brought against it, Edward Owens, the engineer, and G. H. Sanders, the fireman, both of whom are citizens of Kentucky, and in charge of the engine that struck appellee's intestate.

The allegations of the petition necessary to be noticed in considering the point under consideration are as follows: "Plaintiff says that, as his said decedent was thus attempting to cross said track, defendant the Chesapeake & Ohio Railway Company, through the gross negligence of its agents, servants, and employees, and the defendant Edward Owens and G. H. Sanders through their own gross negligence, negligently failed to provide, maintain, and keep an adequate and sufficient lookout ahead of said train at the time said decedent went upon said track and was run over, and negligently failed to provide, maintain, and keep a lookout at all upon the left side thereof, and negligently failed to give any signal or warning of the starting or approach of said train, and negligently ran said engine and cars upon and over said decedent, and crushed, bruised, cut, and mangled her head, body, and limbs; * * * that but for the gross negligence of defendants, they could have seen plaintiff's decedent in time to have stopped before striking her, and, after striking her and after she had been pushed by the engine to the east margin of Main street, they could still but for their gross negligence have stopped said train, which was at the time moving very slowly, before it ran over or materially injured her; but that instead of stopping in order to save her life, which they could easily have done, they were grossly negligent, in that they continued to run said engine forward until it had passed over her body. * * * He says that all of the acts and omissions herein complained of were due to and caused by the gross negligence of the defendants engaged in equipping, controlling, directing, and operating said engine and train of cars."

The petition for removal on the part of the railway company did not deny that Celia Banks was struck and killed by one of

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its engines in charge of Owens and Sanders; but, after denying specifically the averments of the petition charging it, the engineer, and fireman with negligence, averred: "That each and all of them were false and untrue, and were known to the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue, but were made for the sole and fraudulent purpose of affording a basis, if possible, for the fraudulent joinder of the said Owens and Sanders with this petitioner in this action, and for the purpose of thereby fraudulently depriving this petitioner of its right under the Constitution and laws of the United States to have this action removed into the Circuit Court of the United States for the Eastern District of Kentucky, and that neither of said allegations as to either said Owens or said Sanders can be sustained by the plaintiff on the trial of this action." It is now the contention of counsel for the appellant company that: "For the purpose of determining its right to a removal, the lower court was bound to take the averments of the removal petition as true, and that, taking them as true, the right to remove was clearly made out. That where admitting averments of the removal petition to be true, where they made a proper case for removal, the application for removal in itself works ipso facto the transfer to the federal court, and deprives the state court of its jurisdiction; and, if the plaintiff desires to make an issue upon the truth of the averments upon which the right of removal is based, he must do this, not in the state court, but in the federal court, which latter court alone has jurisdiction to try such issue." It will at once be perceived that, if this contention is maintainable, the action against the railroad company should have been removed, although the petition stated a joint cause of action against all of the defendants sufficient to sustain a joint or several judgment against them. It will further be seen that its admission as a rule of practice would operate to work a removal to the federal court so far as the nonresident defendant was concerned of every action involving \$2,000 or more brought in a state court against a nonresident and resident defendants, and give to the federal courts the exclusive right to hear and determine whether or not the action should be removed. The argument of counsel is that although the petition of the plaintiff may in good faith state a good joint cause of action against all of the defendants, and although the plaintiff may be able to support the petition by evidence that would amply sustain a judgment against all of them, nevertheless if the petition for removal charges, as in this case, that the joinder of the resident defendants was fraudulent, the state court is at once and upon the filing of the removal petition divested of jurisdiction to hear and determine the question of removal, and the action must be at once transferred to the federal court, in which court the plaintiff if he desires to have the action remanded to the

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state court may go and make his motion, which the federal court may grant or refuse as in its judgment may seem right and proper. Counsel, in short, would have us say that such an action as we have described brought in a state court that had jurisdiction of the subject-matter of the action and the parties must be removed upon the mere filing of the petition, although the action could not have been brought in the federal court in the first instance, as the federal courts have not jurisdiction where there is a joint controversy and one of the defendants is a resident of the state in which the action is brought.

[1] We fully appreciate the fact that in cases in which the federal courts have jurisdiction their authority is paramount to that of the state courts, and that the state courts must yield in all cases in which there is conflict of jurisdiction. Where the point in issue involves a federal question, and it has been ruled by the Supreme Court, the state courts should and do follow its ruling.

[2] But, on the other hand, if the action has been brought in a state court that has jurisdiction of the subject-matter as well as of the parties to the action, its right to hear and determine the cause should not be surrendered in the absence of a plain ruling adverse to its jurisdiction by a court of superior authority. Questions like this have come before the Supreme Court in many cases, but we do not think the decisions of that court sustain counsel in his contention that the filing of a sufficient removal petition and bond in an action rightfully brought in a state court and that could not be brought originally in the federal court operates to transfer the case merely because the removal petition charges a fraudulent joinder. In *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, an action was brought in a state court in Tennessee by the administrator of Florence James, who was a citizen of that state, for the negligent killing of his intestate by the defendant railroad company, against the railroad, an Alabama corporation, and Mills and Fuller, both citizens of Tennessee. The petition averred, in substance, that the plaintiff's intestate had been negligently and wrongfully run over while upon the track of the railroad company by an engine and train of cars owned and operated by it, which was at the time under the management and control of Mills, its conductor, and Fuller, its engineer. The court, quoting with approval from the case of *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, said: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up

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different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" To the same effect is *L. & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474. In *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, it is said: "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." In *Stone v. State of South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, the court said: "A state court is not bound to surrender its jurisdiction of a suit on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer. * * * The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends and that of the circuit court begins." To the same effect is *Crehore v. Ohio & Mississippi R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144. These cases illustrate the rulings of the Supreme Court upon the question, and in no one of them or indeed in any other we have examined has it been held that the mere filing of a removal petition works a transfer in cases where the state court had and the federal court did not have original jurisdiction. A different rule obtains when the action brought in the state court and sought to be removed is one that might have originally been brought in the federal court, and this distinction should always be kept in mind in determining the right and power of the state court to pass upon the question of removal.

[3] To restate the proposition, if the state court in which the action is pending had, and the federal court did not have, original jurisdiction of the subject-matter of the action, it is for the state court to determine the question of removal.

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[4] On the other hand, if the action sought to be removed might have originally been brought in the federal court, then the filing of the removal petition with a sufficient bond operates to transfer the case from the state court to the federal court. This distinction is well recognized in *Burlington R. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, and *Texas & Pacific R. Co. v. Eastin*, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946.

But it is claimed by counsel that the decisions of this court upon the question under consideration are conflicting, as the court in *Illinois Central R. Co. v. Jones*, 118 Ky. 163, 80 S. W. 484, 26 Ky. Law Rep. 31, held that, after the filing of a removal petition accompanied by a sufficient bond, the state court could proceed no further; while in the cases of *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370, *Dudley v. Illinois Central R. Co.*, 127 Ky. 221, 96 S. W. 835, 29 Ky. Law Rep. 1029, 13 L. R. A. (N. S.) 1186, 128 Am. St. Rep. 335, and *Underwood v. Illinois Central R. Co.*, 103 S. W. 322, and others, it was held that the state court had the right to inquire whether the facts alleged in the petition for removal were true, and to determine for itself whether the action was removable. In the *Jones Case* is found the following, which counsel argues is in conflict with subsequent cases: "If the petition for removal be filed in the state court in due season, and be accompanied by sufficient bond and motion, and if the petition states facts showing, or if it and the record together then show, a prima facie right to the removal by the petitioner, it is the duty of the state court to proceed no further than to satisfy itself as to the sufficiency of the bond." But in this expression the court had reference to cases of which the federal court had original jurisdiction, and not to cases in which exclusive original jurisdiction was in the state court. This is made plain by the following excerpt from the opinion: "But whether upon the facts stated in the petition and record there was presented a federal case was within the jurisdiction of the state court to adjudge [citing authorities]. While the state courts cannot inquire whether the facts alleged in the petition for removal are true, yet, when the petition for removal and the record do not show a prima facie right to the removal, the state court may refuse to surrender the case, and will proceed to its trial." In the *Coley Case* the suit was brought against the railroad company, a foreign corporation, and the engineer of the train, a citizen of Kentucky. The petition for removal charged that the engineer was joined for the fraudulent purpose of preventing the removal, and the insistence was made, as in this case, that upon the filing of the petition the case should have been transferred. But in answer to that contention this court said: "The effect of this would be to give the federal courts jurisdiction of the merits of the case in actions of this sort, although

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such jurisdiction is expressly withheld by the act of Congress. * * * The state court has jurisdiction to try the merits of the case if there is a joint controversy, and it will not do to say that the action must be transferred to the federal court for that court to determine whether the state court may try the case on the merits." In the Dudley Case a resident citizen was joined as a defendant with a foreign corporation. The petition for removal was denied, and upon the trial of the case, when the plaintiff had concluded his evidence, the court directed the jury to return a verdict in favor of the resident defendant. Thereupon the foreign railroad company renewed its motion for removal, which was sustained. In considering the case the court said: "It is true that it is for the state court to determine from the record when the motion for a transfer is made whether or not there is then presented a state of case authorizing a transfer. * * * And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. * * * But when during the progress of the trial, for instance, at the close of the plaintiff's evidence, it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the belief or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff by making allegations that he must have known he could not establish to deprive the defendant of a right guaranteed to it or him by the law." There is no conflict in the decisions of this court, nor are its opinions in conflict with the decisions of the Supreme Court. *Illinois Central R. Co. v. Houchins*, 121 Ky. 530, 89 S. W. 530, 28 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205; *Ward v. Pullman Car Corporation*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343.

But in an effort to put at rest any doubt as to the position of this court upon questions like the one presented in this case we hold:

[5] (1) That when a petition against a nonresident and resident defendants states a good joint cause of action against all of them, and a petition for removal is filed, charging that the resident defendants have been joined for the fraudulent purpose of defeating a transfer of the case, it is for the state court in which the action is pending to determine as a matter of law from an inspection of the petition of the plaintiff and the petition for removal whether the action shall or not be removed, unless the action was one that could upon the averments of the petition have been brought in the federal court.

[6] (2) If the petition for removal is accompanied by affidavits supporting its averments, the plaintiff may also file controverting

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affidavits, and the state court may then pass upon the question and determine for itself whether the action shall or not be removed.

[7] (3) If the state court upon the filing of the petition for removal alone or accompanied with affidavits declines to order a removal, and the case goes to trial, the nonresident defendant may upon the conclusion of the evidence for the plaintiff or after all the evidence is in again move the court for a removal; and if, upon hearing the plaintiff's evidence, or all the evidence, the state court is of the opinion that there was a fraudulent joinder, and that the plaintiff did not in good faith have any reason to believe when he filed his petition that he could make out a case against the resident defendants, the action should be removed; otherwise not.

(4) If the petition filed by the plaintiff in the state court states a cause of action that might have been brought in the federal court, or rather a cause of action that the federal court would have original jurisdiction of, and a petition for removal is filed in due time, accompanied by a sufficient bond, and the removal petition or the record as made up shows a right of removal, the state court should without delay so order.

[8] From what we have said it follows that the court did not err in refusing to remove the case when the petition for removal was filed, as upon the averments of the petition a cause of action was stated that could not have been brought in the federal court, as the federal court has not jurisdiction of an action like this between resident parties or an action in which one of the defendants jointly sued is a resident. Nor did the court err in refusing a transfer on the motion made for that purpose after the evidence was in, as the record as then made up did not show that the plaintiff when the suit was filed did not in good faith have reason to believe that an action could be maintained against both the engineer and fireman. On the contrary, we are of the opinion that the evidence made out a case of actionable negligence against the fireman, and that the court should not have directed a verdict in his favor.

In April, 1907, Celia Banks, a woman about 45 years of age, accompanied by her son, her father-in-law, and other members of her family, arrived at Winchester, a city of several thousand population, on the morning express train from Ashland, Ky. The appellant railroad company's main line at Winchester runs east and west, and its passenger station is about a square east of Main street, which is the principal thoroughfare of the city and crossed the railroad at right angles. This street is reached from the station by a concrete walk adjoining the track. Passengers arriving on trains use this concrete walk to Main street; and, if they desire to go into the northern part of the city, they cross defendant's track at Main street. The train from which Mrs.

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Banks alighted stopped a few minutes at Winchester for the purpose of receiving and discharging passengers, and then started on its journey west and towards Main street. Mrs. Banks and her party, after leaving the train, walked down the concrete walk to Main street, and, desiring to go into the northern part of the city, they started across the track. About the time Mrs. Banks reached Main street, the train started, and, when it had traveled a few feet and acquired a speed estimated at from two to five miles an hour, Mrs. Banks stepped from the concrete walk onto the track in an effort to cross it. She wore a sunbonnet, and her back was at least partly to the engine, and when she had taken a few steps from the concrete walk towards the track she was struck by the engine, and rolled by it on the side of the track until she reached the middle of Main street, some 40 feet distant from where she was struck. At this point she was run over by the wheels of the engine, which cut off one leg and inflicted other serious injuries, from which she died.

The decisive questions of fact in the case are: (1) Did the persons in charge of the engine keep such a lookout as their duty to the public required them to keep? (2) If they had kept such a lookout, could the injury to Mrs. Banks have been avoided? (3) Was she guilty of such contributory negligence as would defeat a recovery? Other important questions are: How close was Mrs. Banks to the engine when she stepped off the concrete walk onto the track, the speed of the train when she stepped on the track, and within what space it could have been stopped?

[9] A number of persons saw the accident; but, as they viewed it from different standpoints, there is much conflict in their evidence in respect to the controlling questions of fact that we have mentioned. Without relating in detail the evidence, we deem it sufficient to say that the testimony for appellee conduced to show that the engine at the time Mrs. Banks stepped off the concrete walk towards and onto the track was about 20 feet from her, and running at a speed of 3 or 4 miles an hour, and that it could have been stopped in a distance of not exceeding 12 feet if a signal to stop had then been given to the engineer. On the other hand, the evidence for the appellant is to the effect that, when she stepped on the track, the engine was only 10 or 12 feet from her and running some 6 or 8 miles an hour; and that, after she stepped on the track, the engine could not have been stopped before striking her. She stepped on the track on the fireman's side of the engine, and it is conceded that the engineer could not have seen her if he had been keeping a lookout, as the boiler projected so far ahead of the cab that the view of a person on the fireman's side within 40 or 50 feet of the engine was obstructed by the boiler and front of the engine. The fireman testified that, when or about the time the train started, he put in a few shovels of coal, and then stepped out in the gangway between the cab and

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the tender, and was looking back at the rear end of the train when he heard a call of distress, and saw Mrs. Banks nearly under or under the engine on his side, and that, as soon as he discovered her, he at once signaled to the engineer to stop the train, and he did so as soon as possible.

[10] We have, then, this condition of affairs: This train when it started from the depot was within a few feet of a much traveled street in a populous district of the city, but the engineer, however sharp a lookout he was keeping, could not see persons at the street crossing approaching or on the track on the fireman's side after the engine started, and the fireman was engaged in looking at the rear end of the train. The result of this was that no lookout for travelers at this crossing was kept at the time Mrs. Banks was struck. The engineer could not see the crossing in front of his engine, and the fireman was looking in another direction. As under the circumstances of this case it was the duty of the company through its engineer and fireman to keep a lookout at this time and place, there was evidence sufficient to authorize a submission of the case to the jury and sustain a verdict, upon the ground that, if a lookout had been kept by the fireman, the accident to Mrs. Banks could have been averted. So that the vital question in the case is, Was the fireman negligent in failing to keep a lookout? We have never gone to the extent of holding that railroad companies should have a third person in the engine to keep a lookout at times and places where this duty is demanded, and when the other duties and situation of the engineer and fireman were such that they could not do so. Nor have we ruled that either the engineer or fireman must postpone when they are approaching a crossing at which the presence of travelers must be anticipated the performance of essential duties in connection with the running of the train that interfere with their keeping a lookout. Nor is it necessary to sustain the judgment that we should so hold in this case, as we think the fireman was guilty of negligence in failing to keep a lookout in front of the engine at the time he was looking at the rear of the train, and that, if he had been keeping such a lookout, he could have discovered the presence of Mrs. Banks on the track in time to have signaled the engineer to stop the train, and that it could have been stopped before striking her. If it was not the duty of both the fireman and engineer under the circumstances described to keep a lookout, it is difficult to imagine a state of case in which the lookout duty would be required, as men, women, and children at this point were constantly crossing the track in going from one part of the city to another, and from one street to another. It is attempted, however, to excuse the conduct of the fireman in looking at the rear of the train in place of in front of the engine upon the ground, as stated by counsel, "that it is more important for the safety of the traveling public that

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the fireman in such case should look back to see if the train is clearing the station without injuring passengers, and to be ready to receive signals in case of danger where persons are boarding the train or alighting from it, than it is for him to look ahead." But this argument does not meet or answer the duty of the railroad company at the time and place this accident happened. There may be times and places in which a fireman would be excused in looking towards the rear of the train, rather than in front of it, but this was neither such time nor place. The train was equipped with a full crew, who could and doubtless did exercise care to see that passengers were not injured by the negligence of the company in boarding or alighting from the train, and to them the fireman should have left this duty.

[11] Nor is the negligence of the fireman to be excused upon the theory that he could not have anticipated that Mrs. Banks would step from a place of safety on the track in front of the moving engine. It is negligence of this character on the part of travelers that persons in charge of an engine approaching crossings where travelers have a right to be and go that makes it the duty of trainmen to anticipate and protect them if they can from accident and injury. Except for the fact that travelers are negligent, it would not be necessary for trainmen to keep a lookout at any street or crossing. Nearly every crossing accident that happens is due in more or less degree to the negligence of the traveler, and it is the recognition of this carelessness or thoughtlessness on the part of the traveling public that has induced the law to impose upon persons in charge of an engine the duty of keeping a lookout at crossings.

[12] Nor does the fact that the bell may have been ringing or that the crossing gates on Main street were down excuse or diminish the lookout duty. It is more important for the safety of travelers at places like this that this duty should be observed than that the bell should be rung or the crossing gates closed, as the ringing of the bells and the closing of the crossing gates offer little protection to persons who thoughtlessly or carelessly go upon railroad tracks in front of approaching trains. The fact that such persons, heedless of the danger, go upon the tracks when bells are ringing and crossing gates are down is one of the reasons why the lookout duty is required and should be maintained. In short, the chief purpose of the lookout duty is to protect the traveling public from the consequences of their own negligence. From the facts we think it may safely be said that the fireman was negligent and that his negligence was the proximate cause of the injury, and that it was sufficient to authorize the verdict and judgment against the railroad company.

[13] But the question remains, Was this negligence of such a character as to warrant a judgment against him? It is true his negligence consisted in his failure to perform a duty, but it was

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more affirmative than negative negligence. He could and should have performed the duty of keeping a lookout. The duty of keeping a lookout was imposed upon him, and did not depend upon what some one else did or should have done, but failed to do, or upon what some one else did not do, but should have done, as was the case in *Cincinnati R. Co. v. Robertson*, 115 Ky. 858, 74 S. W. 1061, 25 Ky. Law Rep. 265, and *Dudley v. Illinois Central R. Co.*, 127 Ky. 221, 96 S. W. 835, 29 Ky. Law Rep. 1029, 13 L. R. A. (N. S.) 1186, 128 Am. St. Rep. 335. The facts resemble more the case of *Ward v. Pullman Car Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343, where the court in speaking of the negligence of the employees of a railroad company who were charged with the duty of inspecting cars and who had been joined as defendants in the action, said: "It is not a case of mere failure to act, but it is a case of one who was charged with the duty of seeing that the car was safe before delivering it to another to be used with actual knowledge that if it was unsafe it would endanger his life; for they must be charged with knowing what they should have known by the exercise of ordinary care when they made the inspection and passed the car. If they had not inspected the car at all, and had not approved the car in any way, they would have done no positive act, and a different question would be presented. We therefore conclude that, if they were the only defendants to the action, a recovery might be had against them under the allegations of the petition." And so in this case. The failure of the fireman to keep a lookout was more than mere nonfeasance. It was a breach upon his part of a positive duty enjoined upon him, and his failure to perform this duty was actionable negligence. If the engineer of a train fails to keep a lookout, and thereby injury results to a traveler, there can be no doubt that the engineer would be personally liable, and it is as much the duty of the fireman as it is the engineer to keep a lookout, and if he negligently fails to do so as in this case, his liability is the same as that of the engineer. *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370.

[14] The instructions are complained of, but we think they submitted fairly the only issue of fact involved in the case, which was whether or not the persons in charge of the engine if they had been exercising ordinary care could have discovered the peril of Mrs. Banks in time to have prevented injuring her. It was correctly assumed by the trial court that Mrs. Banks was guilty of contributory negligence, but her negligence did not excuse the defendants if after discovering her peril they could have avoided injuring her, and this the jury found they could have done if they had been exercising ordinary care to discover her presence on the track.

[15] Counsel insist that the instruction misapplied what is

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known as the "last clear chance rule," but in reaching this conclusion counsel assumes the state of facts that are in dispute. If the facts assumed were admitted, then the criticism of the instruction would be correct. The "last clear chance rule" is thus stated by counsel: "If the plaintiff by his own negligence has put himself in a position of peril, and the defendant discovers his danger, or, by reason of some duty owing by him to the plaintiff, ought to discover it, and after that fails to exercise ordinary care to avoid the injury, then the defendant is liable notwithstanding this prior negligence of the plaintiff, because, having the last clear chance or opportunity to prevent the accident, his negligence, and not that of the plaintiff, is regarded as the proximate cause." If we should accept this definition of the rule as correct, and hold that it was in force in this state, although it was expressly repudiated in *L. & N. R. Co. v. Trisler*, 140 Ky. 447, 131 S. W. 198, we think there was evidence sufficient to justify the jury in finding and the court in rendering judgment that Mrs. Banks had negligently put herself in a position of peril, but that the fireman if he had been keeping a lookout could have discovered her peril, and, after discovering it, the fireman and engineer could by the exercise of ordinary care have avoided the injury.

[16] Another objection is that the verdict, which was for \$5,000, was excessive; but we are not disposed to disturb the judgment on this ground. There is evidence that Mrs. Banks was at the time afflicted with tuberculosis, and the contention is that her death, which occurred several months after the injuries were received, was the result of this disease, and not the injuries. On the other hand, there was evidence that she did not have tuberculosis, and that her death was the direct result of the injuries. The issue of fact thus raised was for the jury, and it was left to them under proper instructions to decide.

[17] Another complaint is that the court erred in permitting J. F. Banks, the husband of Mrs. Banks, to testify as to her condition when he saw her at the Lexington hospital and afterwards; but there is no merit in this contention. *Ætna Life Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523.

Perceiving no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

SIGLIN *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, May 10, 1911.)

[130 N. W. Rep. 1057.]

Master and Servant—Injury to Servant—Negligence.*—A passenger brakeman was injured while standing at a switch by being caught by a slat projecting from the platform of a coach. It was his duty to observe the presence of things on the train. Just before the accident, he was on the platform but did not see the slat then. None of the men at work on the train had any slats or tools with them. There was no evidence that any employee knew that the slat was there until after the accident. Held, that no presumption arose that the slat was placed there by the agency of the company.

Master and Servant—Injury to Servant—Obligation of Master.—Where a passenger brakeman was injured by stumbling over the end of a guard rail, and the evidence showed that blocking at the end of the rail would have increased the danger of stumbling, and that it was impossible for one to have his foot caught between the main rail and the guard rail, the failure to block the guard rail was not actionable negligence.

Master and Servant—Injury to Servant—Obligation of Master.†—A passenger brakeman was injured by being thrown against a viaduct pole near a track used only for turning trains on a Y in railroad yards. The east rail of the track was 4 feet from the post, and a guard rail was $3\frac{1}{2}$ inches therefrom. The side of an ordinary passenger coach extended about $2\frac{1}{2}$ feet over the rail, leaving 18 inches between a car and a post. It was not necessary for brakemen to climb to the top of their cars on the side thereof, nor to go beyond the post except when on the track. Held not to show actionable negligence in the location of the railroad track and guard rail with reference to the post.

Appeal from District Court, Tama County; J. M. Parker, Judge.

Action to recover damages for a personal injury. There was

*For the authorities in this series on the question whether a presumption of negligence arises against the master from the fact that his employee is injured, see last foot-note of *St. Louis, etc., R. Co. v. Ramsey* (Ark.), 38 R. R. R. 787, 61 Am. & Eng. R. Cas., N. S., 787, second head-note of *Finch v. Atlanta, etc., Ry. (S. C.)*, 38 R. R. R. 758, 61 Am. & Eng. R. Cas., N. S., 758; first head-note of *Midland Valley R. Co. v. Fulgham* (C. C. A.), 38 R. R. R. 458, 61 Am. & Eng. R. Cas., N. S., 458.

†For the authorities in this series on the subject of the duties and liabilities of a railroad, as an employer, with respect to objects or structures over or too near tracks, see first foot-note of *West v. Chicago, etc., Ry. Co. (C. C. A.)*, 37 R. R. R. 663, 60 Am. & Eng. R. Cas., N. S., 663; sixth foot-note of *Heilig v. Southern R. Co. (N. C.)*, 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501.

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a directed verdict for the defendant and a judgment thereon. The plaintiff appeals. Affirmed.

Willett & Willett, for appellant.

Struble & Stiger, James C. Davis, George E. Hise, and A. A. McLaughlin, for appellee.

SHERWIN, C. J. The plaintiff was an experienced passenger brakeman in the employ of the defendant, and was injured while assisting in turning his train on a Y in the yards at Sioux City. When turning the train, it was the plaintiff's duty to throw the switches before the train passed over them, and to line them up afterwards. The accident occurred in the forepart of January, 1908. On the day of the accident the train reached Sioux City from Tama about 6 o'clock in the evening, and, after discharging its passengers, the plaintiff, with the conductor and other employees, proceeded to the Y for the purpose of turning the train around preparatory to its return to Tama the next day. A viaduct, supported by posts, crossed the tracks used for turning the train, and one of these posts stood four feet away from the east rail of the track so used. Four feet south of this viaduct post there was a switch stand that controlled the rails on the end of one of the legs of the Y. The train was backed towards this switch, and the plaintiff threw the switch for it to pass onto the other track. He stood by the switch stand until some of the cars had passed, and then stooped to pick up his lantern, when something caught him on the neck, and carried him forward. He testified that he ducked to get from under it, and it slipped over his head and threw him against the car; that he was falling between the cars and caught hold of the hand rod on the car; that, as he caught that rod, he stumbled, his hand was jerked loose, and he was thrown against the viaduct post and crushed and rolled through there, and then dropped on the other side, where his hand was caught under the wheels. Between the east rail of the track under the viaduct and the viaduct posts there was a guard rail, placed there for the protection of the viaduct. It was eight inches from the main rail and unblocked, and the plaintiff testified that he stumbled over its end at the time he was thrown against the viaduct post. After the accident, a wood slat, similar to an ordinary bed slat, was found on the platform of the south end of the smoking car, the end of the slat projecting east therefrom about 18 inches. The plaintiff testified that he was caught by this slat. He alleged that the defendant was negligent in permitting the slat to so project from the car; that it was negligent in having the switch stand improperly located with reference to the viaduct post; that there was negligence in failing to block the guard rail, and negligence in placing the railroad track so close to the viaduct post. It must be conceded, for the purposes of this case, that the plain-

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tiff was caught and carried along by the slat that was afterwards found on the platform of the car.

[1] But there is not the slightest evidence that the defendant was in any way responsible for its being there, or that it was negligent in not knowing that it was there. It was a part of the duty of the plaintiff to look out for the presence of such things on the train, and just before the train left the depot in Sioux City for the purpose of turning around the plaintiff was on this same platform, and says that the slat was not then there. He was on the platform again only a few minutes before the accident, and the slat was not in sight then. The only employees of the defendant engaged on the train at the time besides the plaintiff were the conductor, the engineer, and the fireman. The two latter were on the engine all the time, and the conductor, who was assisting the plaintiff, testified that the slat was not on the platform when the train left the depot. The baggage car had been locked while at the depot, but the plaintiff testified that he saw a car cleaner in there after they had started, and that a car repairer was in the smoking car as they backed down towards the switch. But neither of these men were at work in the cars, nor did they have any slats or tools with them. In a word, there is no evidence even tending to show that any employee of the defendant placed the slat on the platform, or knew that it was there until after the accident. No presumption arises that it was placed there by any agency of the defendant. *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918; *O'Connor v. Railway Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038.

[2] The plaintiff does not claim that he caught his foot between the main rail and the guard rail, but that he stumbled over the end of the guard rail. A failure to block could not, therefore, be a proximate cause of his injury. Blocking at the end of the rail would have increased rather than diminished the danger of stumbling. Nor was there negligence in not blocking it, because the evidence conclusively shows that it would be impossible to catch a foot between the two rails.

[3] Nor do we think there is evidence showing negligence in the location of the railroad track and guard rail with reference to the viaduct post. The east rail of the main track, as we have said, was four feet from the viaduct post, and the guard rail was three feet and four inches therefrom. The side of an ordinary passenger car extends about 2½ feet over the rail, which would leave 18 inches between a car and the post, clearance sufficient for passage under ordinary circumstances. It is not shown that it is ever necessary for passenger brakemen to climb to the top of their cars on the side thereof. Indeed, the plaintiff testified that it had never been necessary for him to go beyond the switch stand south of the viaduct post. The conduct-

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or's place, when they were turning trains on the Y, was on the rear platform of the rear car, and it was not necessary for any of the defendant's employees to go beyond this post except when on the train. The defendant did not use the track for any other purpose; it being owned by another company. It clearly was not negligence to use this track as the defendant did use it. In the view we take of the case, it is not necessary to discuss questions of proximate cause and the assumption of risk. We think the defendant is not shown to be negligent, and the judgment is therefore affirmed.

Affirmed.

COMMONWEALTH v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, May 5, 1911.)

[136 S. W. Rep. 869.]

Master and Servant—Injuries to Servants—Regulation—"Frogs."*
—Ky. St. § 780 (Russell's St. § 5329), provides that every railroad company shall block the frogs on its tracks to prevent the feet of its employees from being caught therein. Held, that the word "frog," as so used, meant a device made of several rail sections secured to a plate or bolted together to form a connection of one track with another branching from or crossing it, and did not include the opening at the end of a guard rail, maintained opposite the frog and used to keep the wheel from slipping off the other rail while passing over the frog.

Appeal from Circuit Court, Rockcastle County.

Action by the Commonwealth against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

Benjamin D. Warfield and Chas. H. Moorman, for appellee.

HOBSON, C. J. Section 780, Ky. St. (Russell's St., § 5329), regulating railroad companies is as follows: "Before the first day of January, 1894, every company shall adjust, fix or block the frogs on its tracks to prevent the feet of its employees from being caught therein." Section 793, Ky. St. (Russell's St., § 5342), provides a penalty of not less than \$100 nor more than \$500 for a violation of the statute.

*For the authorities in this series on the subject of the duty of a railroad company, as an employer, to block its frogs, see third paragraph of first foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493.

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The Louisville & Nashville Railroad Company was indicted in the Rockcastle circuit court for failing to block a certain frog on its line of railroad in Livingston, Ky. It pleaded not guilty. The case coming on for trial before a jury, H. J. McClure, who was introduced as a witness for the commonwealth, stated that a frog is put in where a siding leaves the main track. The purpose of it is to connect the siding with the main track, so that cars may be run on the siding when needed. A guard rail is put on the inside of the opposite rail to keep the wheels on the track; the flange of the wheel fitting down into space between the guard rail and the main rail. There was a block in the frog, but there was no block in the guard rail. The guard rail at the ends is turned out a little to keep the flange from striking it, and there were no blocks here. He also testified that a guard rail is necessary at the frog, as it holds the cars on and prevents them from leaving the track as they pass over the frog. It was only the guard rail that was unblocked. The only other witness introduced by the Commonwealth was J. S. Langford, who testified that a wooden block of triangular shape, 15 or 20 inches long, is put in the heel of the frog; the reason for this being that the brakeman is liable, if the space is not filled, to get his foot caught in it when making switches. He said that the guard rail was not the frog. The court then asked him this question: "Q. Is that space in there between the guard rail and the main rail called a frog? A. No, sir."

This being all the evidence offered by the commonwealth, the court instructed the jury peremptorily to find the defendant not guilty; and, the indictment having been dismissed, the commonwealth appeals.

The frog is so called from its shape as originally made. The guard rail, to keep the wheel from slipping off the other rail while it is passing over the frog, is in no sense a part of the frog. The guard rail is put there to keep the wheel on the track. Guard rails are in common use along railroads. The statute was not aimed to secure the blocking of guard rails. It mentions only frogs, and it would be an undue extension of the statute to interpret it as including guard rails; for they are used, not only at frogs, but at other places. In *Southern Pac. Co. v. Seley*, 152 U. S. 150, 14 Sup. Ct. 531, 38 L. Ed. 391, the United States Supreme Court said: "A frog, in railroad parlance, is a section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog, the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast iron

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frog, in which the space between the rails at the apex of the frog is filled with cast iron."

The purpose of our statute is to require the point or space at the apex of the frog to be filled, so that a man's foot will not be caught and held. In the new Webster's Dictionary, a frog is thus defined: "A device, now usually made of several rail sections secured to a plate or bolted together through distance pieces, forming a connection of one track with another branching from or crossing it. There are many special forms."

It must be presumed that the Legislature used the word "frog" in its recognized sense. While it is true that there must be a guard rail at a frog, there must also be main rails; but the guard rail is no more a part of the frog than the opposite main rail.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. WEBSTER.

(Supreme Court of Arkansas, April 17, 1911.)

[137 S. W. Rep. 1103.]

Continuance—Preparation for Trial—Diligence.—A railway company, sued for injury to an employee, caused by a defective appliance on a car, was not entitled to a continuance to procure evidence concerning the defect where the identity of the car was shown by a report made at the time of the accident.

Continuance—Judicial Discretion.—The question of granting or refusing a continuance is ordinarily discretionary with the trial court.

Depositions—Formalities—Waiver.—Formalities in taking depositions, such as presence and oath of a witness, and manner of transmitting the depositions, may be waived orally or in writing.

Depositions—Formalities—Waiver.—A stipulation in taking depositions, that objections to any part of the direct or cross-examinations might be made when the depositions were offered, does not preclude plaintiff from showing a waiver by defendant of formalities in taking the depositions.

Stipulations—Oral Stipulations—Validity.—Oral stipulations made out of court are enforceable in the absence of statute or court rule to the contrary.

Depositions—Waiver—Statutory Provisions.—Act May 11, 1905 (Acts 1905, p. 775) § 4, providing that if signature to a deposition is waived the officer must so certify, does not exclude other evidence of such waiver.

Master and Servant—Railways—Injury to Brakeman—Defective Appliances.—In an action against a railway company for injury to a brakeman caused by a handhold on a car giving way, held, under the

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evidence, a jury question whether the defect could have been discovered by the company by diligent inspection.

Master and Servant—Defective Appliances—Inspection—Sufficiency.*—An employee's duty to inspect appliances for defects is not necessarily discharged by reliance entirely on external appearances.

Master and Servant—Defective Appliances—Inspection—Sufficiency.—In determining the sufficiency of inspection of appliances for defects, physical laws respecting natural decay from age and exposure, may be considered.

Master and Servant—Railways—Defective Appliances—Inspection—Relative Duties.†—While bound to use ordinary care for his own safety, a railway brakeman need not inspect cars and appliances for defects, that being the company's duty, and the brakeman being merely required, in the use of ordinary care, to take notice of such defects and dangers as are patent to ordinary observation without such inspection as is required of the company.

Master and Servant—Railways—Trainmen—Inspection of Appliances—Scope of Rule.—A railway company's rule requiring trainmen to examine and know for themselves that appliances used by them are in proper condition, does not require them to search for hidden defects nor make more than such cursory inspection in the course of their regular duties as will disclose defects open to ordinary observation.

Trial—Instructions—Assumption of Facts.—In an action against a railway company for injury to a brakeman, caused by a defective appliance on a car, it was proper to refuse an instruction assuming that because the junction point at which the car was received was not an inspection point, a rule requiring trainmen to inspect cars applied.

Master and Servant—Railways—Defective Cars—Duty to Inspect.‡—A railway company's duty to inspect cars for defects imperiling trainmen, is not affected because they are received from an independent line operated to connect an industrial plant, where the cars received are previously furnished by the company.

*See first foot-note of *St. Louis, etc., R. Co. v. Rogers* (Ark.), 37 R. R. R. 297, 60 Am. & Eng. R. Cas., N. S., 297; third head-note of *Erie R. Co. v. Schomer* (C. C. A.), 35 R. R. R. 303, 58 Am. & Eng. R. Cas., N. S., 303.

†For the authorities in this series on the right of a railroad employee to act on the assumption that his master or his representative has or will perform its duties to him, see third foot-note of *Hardy v. Chicago, etc., R. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; last paragraph of first foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; seventeenth head-note of *Grand Trunk W. Ry. Co. v. Poole* (Ind.), 38 R. R. R. 477, 61 Am. & Eng. R. Cas., N. S., 477; third foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; foot-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. A. 283, 60 Am. & Eng. R. Cas., N. S., 283.

‡See first foot-note of *McNamara v. Boston & M. R. R.* (Mass.), 33 R. R. R. 588, 56 Am. & Eng. R. Cas., N. S., 588.

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Master and Servant—Railways—Rules Governing Employees—Binding Effect.§—A railway trainman is not bound by a rule or custom not brought to his attention, and is not presumed to know of a rule not regularly promulgated, or of a custom not shown to have prevailed for some time.

Damages—Personal Injury—Excessiveness.—\$35,000 is not excessive recovery for personal injury to a railway trainman, 35 years old, who was previously in perfect health, where the injury has caused lateral curvature of the spine, intense pain, and permanent incapacity, physical and otherwise.

Wood and Hart, JJ., dissenting.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by R. W. Webster against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Hemingway and L. P. Miles, for appellant.

Jeff Davis and Frank Pace, for appellee.

MCCULLOCH, C. J. The plaintiff, R. W. Webster, claims to have received personal injuries while in the service of the defendant, the St. Louis, Iron Mountain & Southern Railway Company, as brakeman, and sues to recover damages, alleging that his injuries were caused by the negligence of the defendant in failing to exercise ordinary care to discover and repair an insecure handhold or grabiron on the top of one of the freight cars in the train which plaintiff was handling. He claims that the grabiron gave way under his grasp, and that he fell to the ground, receiving severe injuries on account of the fall from the moving train. This occurred on January 10, 1910, near Bryant, a station south of Little Rock on defendant's main line, and only a few miles from the junction with the Bauxite & Northern Railroad, which is a short line running from the defendant's main line, a distance of a mile and a half or two miles, to Bauxite, a station on the Chicago, Rock Island & Pacific Railway, where there is situated a large plant for the reduction of bauxite ore. The car in question was loaded with ore for shipment to East St. Louis, and plaintiff and another brakeman assisted in switching it into their train from the track of the Bauxite & Northern Railroad, on which it had been brought from the reduction plant. The junction of the Bauxite & Northern Railroad with defendant's line is spoken of by the witnesses as "Bauxite,," but the village or railroad station of that name is, as before stated, on the line of the Chicago, Rock Island & Pacific Railway Company. This

§See first foot-note of *Southern Ry. Co. v. Johnson* (Va.), 38 R. R. R. 487, 61 Am. & Eng. R. Cas., N. S., 487.

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action was instituted in the circuit court of Crawford county May 5, 1910. In the complaint it was alleged that, on the 10th day of January, 1910, plaintiff "was in the employ of defendant as brakeman on a freight train, and, as such, was assisting in running a train over the tracks of the defendant's railway between Malvern and Little Rock, Ark., and that as said train was leaving the station of Bryant, plaintiff, in the performance of his duty and exercising due care on his part, was boarding a box car in said train, and while so engaged, took hold of a grabiron on top of said car, and that said grabiron pulled loose from said car, causing plaintiff to fall with great force," etc. Continuing, it was alleged that defendant "carelessly and negligently permitted said grabiron on said car to become loose and unsafe and the fastenings thereof to become weak and imperfect, unsound, and unsafe, and that this fact was known to the defendant, or could have been known by reasonable inspection, and was unknown to plaintiff," etc.

On June 25, 1910, defendant filed in the office of the clerk of the Crawford circuit court a motion to require the plaintiff to make his complaint more definite and certain, by setting forth therein a specification of the particular train on which he was working when injured, whether it was a local or through train, what direction it was going, the number and initials of the car upon which the alleged insecure grabiron was situated, and the time of day or night when the injury occurred. A copy of this motion was delivered to plaintiff's counsel on the day it was filed, and, on June 30, 1910, the day of trial, plaintiff amended his complaint by stating that the train in question was the "only local freight train that run daily between Little Rock and Malvern," that same was going toward Little Rock, and that plaintiff had "no personal knowledge of the number of said car, but that, after the accident, he was informed by those in charge of the train, Mr. Farabee, the conductor, and Mr. Eddy, a brakeman, that the number of same was 350142 and the initials 'C., R. I. & M.' " Defendant thereupon filed its answer, denying all the material allegations of negligence, and pleaded contributory negligence and assumption of the risk on the part of the plaintiff. Defendant also filed a motion for a continuance, to enable it to prepare for defense by obtaining testimony as to the movements of the car in question prior to the accident, "the age of the car, place and manner of construction, when the several grabirons thereon were applied, and who applied them," as to the inspection of the car immediately prior to the accident on defendant's line, or on foreign lines, when and how made and by whom, etc., the condition of the grabirons on said car at the time of the accident, etc. The motion then proceeds as follows:

"(4) If it should appear that the car now named in the complaint was not the one from which plaintiff fell, then defendant

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must, in order to maintain its defense, present evidence along each of the lines hereinbefore mentioned with respect to each car in the train upon which plaintiff was laboring at the time of his injury.

"(5) The defendant has not completed an investigation either with respect to the specific car named or to the cars in said train, nor has it been possible since the filing of this complaint. The evidence which defendant has not now, but which it can procure if this cause is continued, will, it verily believes, acquit the defendant of any actionable negligence. The evidence hereinbefore detailed, which is material, is not wanting at the present time through the consent, connivance, or procurement of the defendant."

The court overruled the motion and recited in the order a finding that it was "conceded that defendant was informed, on the date the accident occurred and immediately thereafter, by both the plaintiff and his fellow employees on the train, that the car from which the grabiron was said to have pulled, and from which the plaintiff was said to have fallen, was the car 'C., R. I. & M. 350142' in the train set out in the complaint as amended." A trial of the case resulted in a verdict in favor of plaintiff assessing his damages in the sum of \$35,000.

[1, 2] The court's refusal to grant a continuance is made the basis of the first assignment of error pressed upon our attention. It must be conceded now that the defendant knew, immediately after the accident, as much as plaintiff knew, and more, concerning the description of the train and of the particular car on which the alleged insecure grabiron was situated. The court, on the hearing of the motion for continuance, found this to be so, and the evidence adduced at the trial of the case showed that, immediately after plaintiff's injury, he and his fellow employees made report to their superiors in service, giving the particulars as to the injury, the number and initials of the car, etc. Moreover, the evidence in the case shows that the superintendent of the road boarded the train a short time after the injury, and received full information about the details of the accident. With this information in its possession at the time of the institution of the action, defendant ought to have been able to prepare for trial. But counsel insist that, notwithstanding the information in defendant's possession, they were entitled to have a specification in the complaint of the particular car on which the insecure grabiron was located before they could be held to be in default for not preparing for trial. They say that the car in question was a "foreign" car—that is, a car which belonged to some other railroad company; that it was very expensive to trace it and get information concerning its condition, the inspections thereof, etc.; and that if defendant had proceeded with an investigation before the complaint was made to specify

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the particular car, the plaintiff might have adduced testimony tending to identify some other car as the one which caused the injury, thus rendering the investigation futile, and leaving defendant in a state of unpreparedness after having pursued a useless and expensive investigation. The answer to this is that no such situation is presented for the court to deal with. Defendant had no right to assume that plaintiff would shift his position in the case, by attempting to prove a defect in some car other than the one which he and his fellow employees had reported as the car which caused the injury. If plaintiff, when required to make his complaint more definite, had specified some other car, then defendant should have been given time to prepare its defense as to negligence with regard to it, but such is not the state of this case. Plaintiff specified the car which defendant had known all the time was the one which was claimed to be defective. The question of granting or refusing a continuance is, ordinarily, a matter of discretion in the trial court, and this court will not disturb a ruling of the trial court in such matter unless an abuse of the discretion appears. We think that in this instance the trial court's discretion was fairly exercised, and no abuse thereof is shown.

[3, 4] Defendant moved to suppress the depositions of certain witnesses on the ground that the statutory formalities were not observed in having the testimony reduced to writing in the presence of the several witnesses, and signed by them, and in transmitting the depositions to the clerk of the circuit court. Plaintiff responded that these formalities were expressly waived by defendant's attorney, who was present at the examination of the witnesses. The court heard testimony, and found that defendant's attorney waived these formalities by an oral agreement. There is testimony to sustain the finding of the court on that issue, and we will not disturb it. These statutory formalities are for the benefit of the parties to litigation, to safeguard the integrity of depositions, but the parties may, by mutual agreement, either oral or in writing, waive such formalities. They may waive the presence of a witness and agree upon the testimony, or they may waive the oath of a witness, or agree upon any vehicle they may choose for the transmission of the deposition. Counsel contend, however, that there was a written agreement entered into during the progress of the examination of the witnesses, and that the said agreement did not cover points of objection now urged. It is true that, during the examination of one of the witnesses, the attorneys reduced to writing a stipulation that, as to all notations of objections and exceptions not made before the notary "all objections and exceptions to any part of direct or cross examinations may be made and submitted to the court when the deposition is offered." This did not cover the question as to the formalities in taking or transmitting the

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depositions, which, according to the evidence adduced on the motion to suppress, was the subject of a prior oral agreement. No rule of evidence was violated in permitting the oral agreement to be proved, for it did not vary, contradict, or enlarge the written agreement which covered another subject.

[5] Authorities are cited to the effect that oral stipulations of counsel made out of court will not be enforced, but this is where a statute or rule of court requires them to be in writing, or where the court in which the stipulation is sought to be enforced adopts a policy of ignoring stipulations not in writing. None of the cases go to the extent of holding that, where a trial court enforces an oral agreement with respect to waiver of formalities in taking testimony, it constitutes reversible error. In the absence of a statute or rule of court, such oral stipulations may be enforced, and where the parties have acted on a stipulation and carried the same into effect it is the duty of the court to hold it to be binding. 36 Cyc. pp. 1282-1284; *Chamberlain v. Fitch*, 2 Cow. (N. Y.) 243; *Ex parte Pearson*, 79 S. C. 306, 60 S. E. 706. Here the plaintiff relied on the alleged agreement, and all the formalities in regard to taking and transmitting the depositions were disregarded. No objection to the depositions was offered until the case was called for trial, and it would have been unjust to permit a repudiation of the alleged agreement, which would necessarily have resulted in postponing the case to allow time for taking the depositions over again.

[6] It is also insisted that the alleged oral waiver of the signatures of the deponents must be disregarded, because of the provision of the act of May 11, 1905 (Laws 1905, p. 779, § 4), relating to depositions, that "if the signature is waived by the parties, the officer before whom the same is taken must so certify." The fact that the statute makes it the duty of the officer to certify the waiver does not exclude other evidence of such waiver. The certificate of the officer is only prima facie evidence of the waiver. *Miller Ex parte*, 49 Ark. 18, 3 S. W. 883, 4 Am. St. Rep. 17; *Davis v. Semmes*, 51 Ark. 48, 9 S. W. 434; *Fakes v. Wilder*, 70 Ark. 449, 69 S. W. 260.

[7] The next contention of the defendant is that the evidence does not sustain the verdict, in that it fails to show that the condition of the grabiron, before the accident, was such that its frailty could have been discovered by diligent inspection. Plaintiff testified that he climbed up the ladder on the end of the car, and grasped the grabiron on top, first with his left hand, trying it to see that it was not loose, and that when he grasped it with his other hand and put his weight on it, the screw in one end came out, letting the iron swing loose at one end, and he fell to the ground. An examination shortly afterwards disclosed the fact that there were three screw holes from which the grabiron had been shifted, and that the wood appeared to be rotten,

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the screws which came out having blackened and rotted wood in the threads. The roof of the car was covered with tin, and the wood underneath the tin could not be seen except at the screw holes. The law applicable to a case of this kind was stated by Chief Justice Cockrill in the opinion in *Railway Company v. Harper*, 44 Ark. 529, as follows: "When an injury has occurred to a servant in consequence of a defect in machinery furnished by the master, to warrant a recovery the servant must show negligence or the want of care and diligence on the part of the master in relation to the defect. The onus of proof is not shifted to the master, as in the case of a passenger injured by a common carrier, by proof of the fact that an injury has resulted from the defect."

The following statement is also given in another decision of this court: "The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work. And when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." *Railway Company v. Gaines*, 46 Ark. 555.

In a recent case somewhat similar to this we said: "The evidence must have affirmatively established four elements of the plaintiff's cause of action before a recovery can be sustained, viz.: (a) That the ladder was defective. (b) That the defect was unknown to the plaintiff. (c) That the defect was known to the defendant, or should have been known by it in the exercise of reasonable care. (d) That the defect caused plaintiff's injuries." *St. L., I. M. & S. R. Co. v. Andrews*, 79 Ark. 437, 96 S. W. 183.

[8] We think that, without violating the rule stated in those cases, the conditions found to exist after the grabiron gave way were such as to warrant a finding by the jury that they should have been discovered before then by reasonably diligent inspection. The wood was rotten, and the condition of the old screw holes indicated that the grabiron had been shifted on account of the rotten wood. The covering of tin obscured a view of the wood, but this called for a more rigid inspection by testing the strength of the grabiron. There is no testimony that an inspection had been made at all, but it is a reasonable inference that, if an inspector had tested the strength of the grabiron, by throwing enough weight on it, to ascertain whether it would bear a man's weight in ordinary use, it would have given way. It cannot be laid down as a rule of law that, where there is a duty

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of inspection, this may be discharged by reliance entirely on external appearances. "Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indications as to the actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of an instrumentality are attached to each other." 1 Labatt on Master & Servant, § 161.

[9] Nor can physical laws with respect to the natural decay from age and exposure be disregarded in determining the question of sufficiency of inspection. Length of time the appliance has apparently been in use may be considered. 1 Labatt on Master & Servant, § 159; *Campbell v. L. & N. R. Co.*, 109 Ala. 520, 19 South. 975. We think the evidence was sufficient to show a defect which should have been discovered by reasonably diligent inspection. The following cases sustain that view: *St. L. & S. F. R. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738; *Ultima Thule, A. & M. R. R. Co. v. Calhoun*, 83 Ark. 318, 103 S. W. 726; *K. C. Sou. Ry. Co. v. Henrie*, 87 Ark. 451, 112 S. W. 967; *Mammoth Vein Coal Co. v. Looper*, 87 Ark. 217, 112 S. W. 390; *St. Louis, I. M. & S. R. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221; *Ry. Co. v. Lewis*, 91 Ark. 349, 121 S. W. 268; *Ry. Co. v. Reed*, 92 Ark. 357, 122 S. W. 645; *St. L., I. M. & S. R. Co. v. Rogers*, 93 Ark. 566, 126 S. W. 375, 1199. The question was one for the jury, as different minds may reasonably reach different conclusions as to whether or not the defect was a discoverable one.

[10] Error of the court is assigned in giving instruction No. 5 and in refusing to give defendant's requested instruction No. 6. These instructions are as follows:

"(5) The plaintiff is required to use ordinary care for his own safety, but this does not include inspection of the cars and appliances for defects; that duty being upon the defendant, and the law permitting the plaintiff to rely upon the defendant for the performance of that duty for his safety. The plaintiff is only required in the exercise of ordinary care to take notice of such defects and dangers as are patent to ordinary observation without the inspection which the law requires at the hands of the defendant.

"(6) If plaintiff knew that Bryant was not a point at which defendant kept an inspector, and plaintiff either in entering or remaining in the service of the defendant, has assumed the duty of inspecting or seeing for himself at such a point that the grabirons on cars delivered there to defendant by another line

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were safe, and failed to do so, but attempted to use the grabiron without ascertaining whether it was safe or not, and fell and was injured, your verdict should be for the defendant."

The fifth instruction, above quoted, which the court gave, states the well-settled rule of law as to relative duties of master and servant—that is, that it is incumbent on the former to inspect for the purpose of discovering and repairing defective appliances with which the servant is to perform the work, and that the latter is only required to look for patent defects which are open to ordinary observation. This applies to foreign cars taken into a train as well as cars owned by the defendant. *Labatt on Master & Servant*, vol. 1, § 174; volume 2, § 584; 3 *Elliott on Railroads*, § 1279; *T. & P. R. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Dooner v. D. & H. Canal Co.*, 164 Pa. 17, 30 Atl. 269.

In *T. & P. R. R. Co. v. Archibald*, *supra*, Mr. Justice White, speaking for the Supreme Court of the United States on this subject, said: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. * * * The employer, on the one hand, may rely on the fact that his employee assumes the risk usually incident to the employment. The employee on the other has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated, by which where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

Mr. Labatt states the rule thus (volume 2, § 584): "As regards instrumentalities not belonging to the master, but temporarily placed under his control for the purpose of facilitating the

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transaction of business in which both he and the owner have a common interest, the only rational and logical doctrine seems to be that a servant, inasmuch as he has nothing to do with the arrangement which the master may make with a third party for their mutual convenience, should be entitled to hold the master responsible for the negligent inspection of the thing so transferred, in all cases in which he would have been able to recover if that thing had been owned by, or permanently in the possession of, the master."

[11] Defendant introduced in evidence one of the standard rules of the company to the effect that "trainmen must examine and know for themselves that the * * * appliances which they are to use are in proper condition." The evidence establishes the fact that the rule was always construed to mean that a brakeman is required to make only such cursory inspection in the course of his regular duties as will discover defects open to ordinary observation, and not to search for hidden defects. Such is the legal construction of a rule of that kind. On this subject Mr. Labatt says (volume 1, § 417): "The general effect of express contracts to examine instrumentalities is to narrow the domain of facts within which the servant is entitled to claim the benefit of the principle that he is entitled to rely upon the proper performance of the master's duties. But it seems to be a legitimate inference from the decisions that, in regard to such examination as may be undertaken in compliance with contracts of this description, they do not impose upon him the obligation of using a higher degree of diligence than that which would otherwise have been incumbent upon him. He is required to take notice of apparent defects like those involved in the cases cited in note 5 to this section. But he is not bound to look for concealed defects." The instruction given by the court was not only in accordance with the law on the subject, aside from any particular rule or custom, but it accords with the rule of the company as ordinarily interpreted. *St. Lo., I. M. & S. R. Co. v. Rogers*, *supra*.

[12, 13] Appellant's requested instruction, quoted above, which the court refused to give, was erroneous for more than one reason. In the first place, it was incorrect in assuming that Bryant (or the junction with the Bauxite & Northern Railroad) was a point where any rule of the company, requiring the trainmen to inspect appliances and cars, was applicable. In other words, the instruction erroneously assumes that because the junction was not an inspection point, the alleged rule requiring trainmen to inspect cars was applicable. This was incorrect, because there is evidence showing that, for purposes of traffic, in transporting ore from the Bauxite reduction plant, the Bauxite & Northern Railroad was treated as a spur, even though it was in fact an independent line. Plaintiff and McDonald, another brake-

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man, testified that, in the shipment of ore from the reduction plant, the defendant took out only cars which it furnished for that purpose. The only inference from their testimony is, that defendant, in receiving shipments of ore, treated the Bauxite & Northern Railroad merely as a spur for the purpose of delivering cars to the reduction plant and in getting them back loaded with ore for shipment. Other witnesses in the case speak of the Bauxite & Northern Railroad as a part of the reduction plant. Mr. Murphy, the superintendent of the Arkansas Division of the defendant's road, who was introduced as a witness by defendant, testified to that effect. He speaks of the reduction plant as being owned by the Bauxite & Northern Railroad, and stated that that road was engaged in no other business except of handling ore from the reduction plant. Now, if it is true that defendant furnished cars from its own line, to be loaded with ore, and only received back the same cars, loaded for shipment, the rule of the defendant company, requiring trainmen to inspect at noninspection junction points, would not apply. The master's duty of inspection applies to cars furnished in that way, for, under those circumstances, the defendant's control over such cars was never relinquished. The fact that the cars were switched over to the reduction plant by an engine of the Bauxite & Northern Railroad, an independent line operated for the benefit of the reduction plant, does not change the rule as to the duty of the defendant, as master, to inspect the cars. The circumstances are substantially the same as, where a railroad furnishes cars to any manufacturing plant on a spur, to be hauled to the plant for loading, by an engine owned by the plant. Under that state of facts cars remained in control of the railroad company, and fall within the duty of the master to inspect. The testimony is undisputed as to the manner in which the cars were furnished for shipment of ore, and received back on defendant's line—that it received back only the cars which it had furnished. It is contended that the testimony of Mr. Murphy, the defendant's superintendent, is to the contrary, but we do not think so. Murphy was examined only as to the custom, generally, as to getting cars from other lines; he was not questioned with reference to the cars received from the reduction plant at Bauxite, and he made no statement as to them. So it was improper to submit to the jury the question as to the duty of plaintiff to inspect at what is termed "noninspection" points.

[14] Another reason why this instruction was erroneous is, that there is no testimony to show that there was a rule of the company, of which plaintiff was informed, or of which he was bound to take notice, requiring trainmen to inspect at noninspection points. Plaintiff testified that he had been working for defendant several months, and had not heard of such rule; that he had worked as brakeman and conductor on railroads in other

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states for about 13 years, and never heard of any such rule in railroad service. The only other testimony on that subject was that of Mr. Murphy, who stated that during January, 1910, "it is a rule and understood that trainmen will know that a car is safe to handle before they take it at point where inspectors are not maintained." It was not claimed that this was one of the published rules of the company, nor was it stated in testimony how long a time it had been a rule or custom for trainmen to inspect cars at what they called "noninspection points." Plaintiff was not bound by a rule or custom which had not been brought to his attention, and he is not presumed to have notice of a rule not regularly promulgated or of a custom not shown to have prevailed for some considerable length of time. *L. R. M. R. & T. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; *St. L., I. M. & S. R. Co. v. Holmes*, supra; *St. L., I. M. & S. R. Co. v. Puckett*, 88 Ark. 204, 114 S. W. 224.

We conclude, therefore, that the trial court committed no error, either in giving instruction No. 5, nor in refusing to give defendant's requested instruction No. 6. We do not find error in any of the rulings of the court, in giving instructions or in refusing requests therefor. We think the case was submitted to the jury upon correct instructions, and that the testimony sustains the verdict as to liability of the defendant for plaintiff's injury.

[15] The final contention is that the assessment of damages was excessive. Plaintiff was, at the time he received the injury, 35 years of age, and was, and had always been, in perfect health and free from any bodily ailments or defects. He had been in railway service as brakeman and conductor, about 13 years; had worked for defendant as brakeman several months and was earning \$79 per month. The fall from the train caused a marked lateral curvature of the spine, the whole trunk was bending over toward the left side and the body was bulging out on the right side, as stated by one of his physicians. It was, at the time of the trial, impossible for him to stoop or bend downwards so as to pick up an object off the floor. He suffered great pain all the time and was unable to perform labor of any kind. He suffered pain in the small of the back and that part of the body was decidedly swollen. The injury resulted in the loss of his sexual power. Physicians testified that the injury was permanent, that he had not improved since he received the injury and would never improve. They stated that, on the contrary, the indications were that he would grow worse. One of the physicians testified that he would not only not be able to perform manual labor, but that the tendency of the injury would be to destroy all of the patient's energy and inclination to work. The treatment which had been administered, though unavailing, was necessarily very painful. While the amount of the verdict seems

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to reach the limit, yet we cannot say that it is excessive. The man's life is permanently wrecked, physically and otherwise. Considering his loss of earning capacity, and the pain and suffering he has endured, and will continue to endure as long as life lasts, together with the other elements which may properly be considered in estimating the damage, he is entitled to a vastly larger amount of damages than his widow or next of kin would be entitled to recover if he had been killed. The evidence is, we think, sufficient to sustain the assessment of damages, and we do not feel justified in disturbing it. The judgment is affirmed.

WOOD and HART, JJ., dissent.

SWANSON v. UNION STOCKYARDS CO. OF OMAHA, Limited.

(Supreme Court of Nebraska, May 23, 1911.)

[131 N. W. Rep. 594.]

Master and Servant—Injuries to Servant—Negligence of Foreman*

—A trackman working in obedience to the orders of his foreman upon a railway track in a stockyard, and in such a position that he could not see cars shunted down the track against empty cars standing thereon in close proximity to him, ordinarily has a right to rely upon his foreman's uniform custom to watch and warn him of approaching cars.

Master and Servant—Injuries to Servant—Contributory Negligence.†—And if, under those circumstances, the foreman departs from his men under circumstances justifying a belief that he intends to occupy a more advantageous point from whence to watch for cars, and without informing them they must rely solely upon their own senses for protection, and he knows that a switching crew and engine are engaged in kicking cars down the track upon which his men are working, but out of their line of vision and that of the switchmen, and does not inform them of the situation, and as a proximate result thereof one of his men is injured by a moving car, the employer is liable if the injured employee is not guilty of contributory negligence.

Appeal and Error—Review—Harmless Error.—In reviewing the

*See second foot-note of preceding case.

†For the authorities in this series on the duty to warn and instruct employees, see extensive note, 25 R. R. R. 638, 58 Am. & Eng. R. Cas., N. S., 638; foot-note of *Pinkley v. Chicago, etc., R. Co.* (Ill.), 38 R. R. R. 791, 61 Am. & Eng. R. Cas., N. S., 791; second head-note of *Horne v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 755, 61 Am. & Eng. R. Cas., N. S., 755; *St. Louis, etc., R. Co. v. Brantley* (Ala.), 38 R. R. R. 450, 61 Am. & Eng. R. Cas., N. S., 450; second foot-note of *Florida E. C. Ry. Co. v. Lassiter* (Fla.), 37 R. R. R. 600, 60 Am. & Eng. R. Cas., N. S., 600.

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record of an action in the district court, this court will disregard any error or defect in the proceedings which does not affect the substantial rights of the complaining litigant, and will refuse to reverse a judgment because of any such error.

Death—Damages.—In an action to recover for the widow's sole benefit for the death of her husband, a recovery of \$5,000 is excessive in view of the fact that he was 65 years of age at the time of his death, earned but \$12.50 per week, and had no source of income other than the result of common labor.

(Syllabus by the Court.)

Appeal from District Court, Douglas County; Kennedy, Judge.

Action by Olena Swanson, administratrix, against the Union Stockyards Company of Omaha, Limited. Judgment for plaintiff, and defendant appeals. Affirmed, on condition.

Greene, Breckenridge & Matters, for appellant.

Henry C. Murphy and *James C. Kinsler*, for appellee.

Root, J. This is an action to recover damages for the death of August Swanson, which was caused as alleged by the defendant's negligence. The plaintiff prevailed, and the defendant appeals.

The defendant in the prosecution of its business employs several switching crews and a number of trackmen. At the point where Swanson was killed three lines of railway lie parallel to each other and to about 40 connected pens used to restrain live stock which are unloaded from cars upon the track nearest the pens. This track is described as the "chute track." The other tracks are known as the "middle" and "outside" tracks, respectively. Early in the forenoon of the day in question, Swanson and several other laborers were working upon the chute track, but were disturbed by the approach of a train of cars loaded with live stock. In obedience to the orders of John Sund, their foreman a number of the men went to a distant part of the yards, while Swanson and several other of the men commenced to clean the middle track at a point opposite to where they had been working on the chute track. To comply with the orders, it was necessary for the men to go upon the middle track, and with their shovels remove therefrom accumulated sand, cinders, offal, and rubbish. At the time this change was made several empty stock cars or box cars, variously estimated at from three to eight in number, were standing upon the middle track, where they had been shunted by a switching crew which was engaged in "sorting empties" further down the track to the south. Swanson and the other men worked northward from the empties. Sund testifies that he hired and discharged men in his gang, that he directed their movements, watched for approaching cars or engines, and warned his men, and this had been his uniform custom.

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Swanson had worked for the defendant in the capacity of a sectionman for more than five years before his death, and Sund had been his foreman during that period. Within a few minutes of the time the men commenced to clean the middle track, the empty cars were moved slowly forward for the space of about 50 feet evidently propelled by the impact of other empty cars which had been kicked down the track, and the men moved a corresponding distance northward, but continued their work. The men were working at intervals for a distance of four rail lengths from the empties, and Sund was at the extreme northern limit of this space. Because of the stock train, the curve in the tracks and the empty cars south of the men, it was impossible for them to see cars or a locomotive moving upon the track south of the empties. Sund left his men at work and walked southward past the empty cars to the switch engine, which at the time was not moving, and spoke to the engineer, but did not tell him or any of the switching crew that the sectionmen were at work on the middle track north of the empty cars. Neither did he direct any person to keep a lookout and warn the men while he was away from them. Within 10 minutes after Sund's departure, about 13 empty cars were at one time shunted down the middle track at the rate of from four to ten miles per hour. The force of the impact of these cars with the other empty cars was so great that the latter moved forward so quickly that Swanson, who was in the act of thrusting his shovel into the soil while he was in a stooping posture, was knocked down, caught upon the rails, and three cars and the front wheels of a fourth car ran over him causing instant death.

The defense is a denial of the defendant's alleged negligence, and a plea of contributory negligence and of an assumption of risk. There are also some allegations in the answer evidently inserted to raise an issue that the defendant is not a railroad company. The trial judge over the defendant's objections submitted to the jury five distinct alleged negligent acts of the defendant upon the proof of any one of which a verdict might be returned in the plaintiff's favor. The defendant by requested instructions sought to have all of these contentions withdrawn from the jury, and now most strenuously argues that there is no competent evidence to sustain them.

[1] For the sake of argument, it may be conceded that the evidence will not sustain every charge of negligence thus submitted to the jury, but there is no conflict in the evidence concerning the foreman's relation to Swanson, or that it was his uniform custom to watch for approaching cars or engines while his men were working upon the track under circumstances at all like those surrounding them at the time Swanson was killed and to warn them of the facts. While the deduction of negligence or the want of negligence from primary facts admitted

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or proved in a particular case is one for the trier of fact to draw, yet it is inconceivable that any intelligent, fair-minded jury would fail to find the defendant negligent in respect to the conduct of John Sund in leaving his men at work behind, but in close proximity to, the barrier of empty cars without substituting another man to discharge his duty to watch and to warn, or, in default of so doing, in failing to notify them that for the time being they must depend solely upon their own senses for protection, or in failing to notify the switching crew of the position of his men. *Mullin v. Central R. Co.*, 77 N. J. Law, 241, 72 Atl. 426. We are of opinion that, if the court committed any error in submitting grounds for recovery that are not sustained by the proof, in the peculiar condition of the evidence, that error is without prejudice, and does not justify a reversal of the case. Code, § 145. We are further of the opinion that it is immaterial whether or not the plaintiff is a railroad company within the meaning of the employer's liability act (section 3 et seq., c. 21, Comp. St. 1909). The court took the view that the defendant is a railroad company, and instructed the jury that Swanson's contributory negligence, if he were negligent, should only be considered in diminution of the recovery, if his negligence was slight, and the defendant's negligence was by comparison gross. A learned argument was presented upon this subject, but we are of opinion that the law thus argued is not necessarily involved in this case.

[2] The evidence to sustain the plea of contributory negligence as we understand the record is about as follows: Witnesses stated that sectionmen are required to protect themselves while working on the track and to keep a lookout for trains; that Sund, when about to depart from his gang, said "Be on the lookout, men!" that Swanson did not face the empty cars, and worked too close thereto notwithstanding a warning given by a Mr. Anderson that if he, Swanson, was not careful, the cars "would drop down on him." Sund did not tell his men that he would not watch for or warn them, and he was going in the proper direction to secure a view of cars coming down the track from the south. It seems improbable that Swanson heard his foreman's statement uttered 120 feet distant from where Swanson was at work, but, if it is conceded that he did, the men were not told that they would be thrown upon their own resources for protection. In cleaning the track the men were in constant motion shoveling and walking to and fro. Swanson had a right to rely upon Sund. The foreman took no exception to the positions assumed by his men, and we think there is little, if any, evidence to sustain a deduction of contributory negligence. The issue, however, was submitted to the jury. Under the instructions, if the jury found Swanson guilty of contributory negligence, it was their duty to make a corresponding deduction in the recovery, provided they found that the defendant's negligence was gross in

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comparison. The verdict is for \$5,000, a sum that precludes a belief that the jury found the deceased guilty of contributory negligence. If the jury rejected this defense, as they had a right to do, it is immaterial whether or not the doctrine of comparative negligence was properly submitted to them. We think section 145 of the Code controls this phase of the case. In our judgment to this point prejudicial error has not been established by the defendant.

It is argued that the recovery is excessive, and a comparison of all of the evidence on this subject convinces us that the defendant has just cause for complaint. Swanson at the time of his death was 65 years of age, was survived by his widow, but, as we understand the evidence, by no children. For eight years preceding his death he had worked as a section hand, and received \$12.50 per week plus some indefinite amount for overtime. There were no children to receive a father's care. There is no proof that he was the master of a trade, or that he could earn money by any means other than by hard manual labor. Swanson's expectancy of life at the time of his death was between 12 and 13 years. We are not unmindful of the fact that but for this accident he might have lived to be 80 or 90 years of age, but it is not within the bounds of probability until past 75 years of age he would retain the ability to perform the hard physical labor which seemed his only source of income. Had Swanson remained in the defendant's employ for 12 years at the wage paid him at the time of his death, losing no time because of sickness or of bad weather, he would receive \$7,800. One-half of that sum would in all probability be required for his own support. The widow is not entitled to receive more than the present financial value to her of her husband's life. If Swanson had not died, but should continue to earn without diminution in amount or for loss time the wages paid him at the time of his death, and had contributed one-half of his earnings to his wife for 13 years, or until he attained 78 years of age, the present value of that contribution on the basis of 5 per cent. interest would be \$3,056. Cases will arise where the courts should not hold a jury to a hard and fast rule of the present value of probable financial contributions in the future, but there is little if anything in the evidence in this case to justify a relaxation of the rule that there must be evidence from which the financial loss may with reasonable accuracy be computed. *Nilson v. Chicago, B. & O. R. Co.*, 84 Neb. 595, 121 N. W. 1128.

[4] Under all of the circumstances of this case, we are of opinion that any recovery in excess of \$3,500 is excessive, and that, unless \$1,500 is remitted as of the date of the judgment, it will be reversed and the cause remanded. If, however, that remittitur is filed within 60 days of the filing of this opinion, the judgment of the district court will be affirmed.

CATHERINE SCHLEMMER, NOW CATHERINE CRAIG, Plff. in Error *v.* BUFFALO, ROCHESTER, & PITTSBURGH RAILWAY COMPANY.

(Argued April 3, 1911. Decided May 15, 1911.)

[31 Sup. Ct. Rep. 561.]

Appeal and Error—Second Writ of Error—Compliance with Mandate.—The action of the highest court of a state in remanding a cause to be retried on the settled principles of law as theretofore declared in its decisions, instead of requiring the further proceedings to conform to the opinion of the Federal Supreme Court, as the mandate of that court, which had reversed a judgment of the state court, required, is not cause for reversing the judgment rendered on the second trial and affirmed by the highest state court, where the change in the form of the mandate has not worked prejudice.

Master and Servant—Contributory Negligence—Safety-Appliance Act.*—Contributory negligence on the part of an employee was a defense to an action founded on the safety-appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), although by § 8 of that act the defense of assumption of risk was expressly excluded.

Master and Servant—Contributory Negligence—Safety-Appliance Act.—The benefit of the provisions of the safety-appliance act of March 2, 1893, § 8, excluding the defense of assumption of risk, was not refused by holding that, as a matter of law, an experienced railway brakeman who persisted in attempting to couple in a dangerous way a car having an automatic coupler to another car not so equipped, when a safer method was called to his attention, and who was killed because he raised his head while making the coupling, in spite of repeated cautions, was guilty of contributory negligence, defeating any recovery.

In error to the Supreme Court of the State of Pennsylvania to review a judgment which, on a second appeal, affirmed a judgment of the Court of Common Pleas of Jefferson County, in that state, in favor of defendant non obstante veredicto, in an action for the death of a railway employee, founded on the Federal safety-appliance act. Affirmed.

See same case below, 222 Pa. 470, 71 Atl. 1053.

The facts are stated in the opinion.

*For the authorities in this series on the subject of the effect of assumption of risk by, and the contributory negligence of, the injured servant on the right to recover against his master under an employers' liability act, see last foot-note of *Ryland v. Atlantic C. L. R. Co.* (Fla.), 35 R. R. R. 56, 58 Am. & Eng. R. Cas., N. S., 56.

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Messrs. Frederic D. McKenney, John Spalding Flannery, William Hitz, Edward A. Moseley, and A. J. Truitt for plaintiff in error.

Messrs. Martin E. Olmsted, A. C. Stamm, and John G. Whitmore, for defendant in error.

Mr. Justice DAY delivered the opinion of the court:

This action was brought in a Pennsylvania court to recover for wrongfully causing the death of Adam M. Schlemmer, plaintiff's intestate, as a result of injuries received while in the employ of the railroad company. The case has been once before in this court, and is reported in 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407. The injury was received while Schlemmer, an employee of the defendant railroad company, was endeavoring to couple a shovel car to the caboose of one of the railroad trains of the defendant company.

Before the case first came here, the supreme court of Pennsylvania had held that the plaintiff could not recover damages because of the contributory negligence of the deceased. 207 Pa. 198, 56 Atl. 417. This court reversed the supreme court of Pennsylvania, and remanded the case for further proceedings in conformity with the opinion of this court.

For a proper understanding of the case a brief statement of the facts will be necessary. The shovel car was not equipped with an automatic coupler, as required by the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, and that fact was the basis of the action for damages. The shovel car had an iron drawbar, weighing somewhere about 80 pounds, protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be effected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in the height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling, and the end of the shovel car would come in contact with the end of the caboose.

Plaintiff's intestate was an experienced brakeman, having been in the service fifteen or sixteen years. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car, and attempted to raise the iron drawbar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing, his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. This happened between 8 and 9 o'clock on an evening in the month of August, and while dusk had gathered, it was not very dark, and

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the testimony tends to show that the situation was plainly observable.

When this case was first before the supreme court of Pennsylvania, that court expressed doubt as to whether the act of Congress applied in actions of negligence in the courts of Pennsylvania, and the judgment on the nonsuit in the court below was sustained because of the contributory negligence of the deceased.

This court held that the shovel car was in course of transportation between points of different states, and therefore was being used in interstate commerce; that the shovel car was a car within contemplation of § 2 of the act of Congress; that § 8 of that act had deprived the company of the defense of assumed risk on the part of an employee; that the ruling in the Pennsylvania court upon contributory negligence was so dependent upon an erroneous construction of the statute that it could not stand. 205 U. S. 1, 13, 51 L. ed. 681, 686, 27 Sup. Ct. Rep. 407. As the alleged right to recover was under a Federal statute, alleged to have been improperly construed against the plaintiff in error, the case presented a claim of Federal right, a denial of which was reviewable here, and the case, for the reason stated, was reversed by this court, and sent back for further proceedings in conformity with the opinion of this court.

We find no occasion to depart from the former decision, and will proceed to examine the record as now presented, which, in material respects, differs from the one previously before the court. It is first objected by the plaintiff in error that the supreme court of Pennsylvania remanded the case to the lower court for trial contrary to the mandate sent down upon the reversal by this court. The supreme court of Pennsylvania remitted the case, after receipt of the mandate from this court, to the lower court, to be retired "on the settled principles of contributory negligence, as heretofore declared in the decisions of this court,"—supreme court of Pennsylvania. The counsel for plaintiff in error moved the supreme court of Pennsylvania to amend its judgment and remittitur so as to conform with the mandate of this court, which motion was overruled.

We are of opinion that the order and remittitur of the supreme court of Pennsylvania, in compliance with the mandate of this court, should have required the further proceedings to conform to the opinion of this court, as its mandate required, and as was within the authority of this court, the matter involved being a right of Federal creation within the ultimate protection of this court.

If an examination of the record indicated that, by reason of this mandate, the subsequent proceedings in the state court had operated to deprive the plaintiff in error of the benefit of a trial under the Federal statute properly construed, we should be con-

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strained to reverse the case. But an examination of the record discloses that the trial judge regarded the decision of this court as settling the right of the plaintiff in error to rely upon the Federal statute in question, and as conclusive of the fact that the shovel car was being employed in interstate commerce at the time of the injury, and was a car within the meaning of the act, and that assumption of risk was no defense to the action. So, it does not appear that the form of mandate sent down by the supreme court of Pennsylvania, after the case was reversed here, worked to the prejudice of the plaintiff in error.

The trial court submitted the case to the jury upon the issues joined under the Federal statute, including the question whether the plaintiff's intestate, at the time of the injury, had been guilty of contributory negligence. Under these instructions the jury found a verdict for the plaintiff.

The court then granted a rule to show cause why judgment should not be rendered non obstante veredicto, which motion was granted, and an opinion delivered, in which the judge held that the testimony did not warrant the conclusion that, in making the coupling, the risk was so obvious that an ordinarily careful and prudent brakeman would not have undertaken it; and therefore, under the statute, assumption of risk was no defense, but reached the conclusion that the deceased was guilty of contributory negligence in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and in not adopting a safer way, which was pointed out to him at the time.

Upon the second appeal, the supreme court of Pennsylvania affirmed the judgment of the trial court, saying:

"Per Curiam: It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing." 222 Pa. 470, 71 Atl. 1053.

The case is now here upon a petition in error to reverse this judgment of affirmance. The statute at the time of the injury complained of took away assumption of risk on the part of the employee as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute.*

*By the 3d section of the act of April 22, 1908, 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171, amending the em-

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When the case was here before, we did not find it necessary to pass upon the question whether contributory negligence on the part of an injured employee would be a defence to an action under the law as it then stood, for, upon the record as then presented, the court was of opinion that to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefit of the statute which made the assumption of risk no longer a defense.

While, as was said in the case when here before, assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 67, 68, 48 L. ed. 96, 100, 101, 24 Sup. Ct. Rep. 24, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinarily prudence requires. (See, in this connection, *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 68, 37 C. C. A. 499, 509, 96 Fed. 298.)

In the present case, the statute of Congress expressly provides that the employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel car was not equipped with an automatic coupler, he would not, from that knowledge alone, take upon himself the risk of injury without liability from his employer.

But there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not, for that reason, absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the

employers' liability act, no employee injured or killed is to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

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safety of employees. *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Grand v. Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Taylor v. Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308. And such was the holding of the court of appeals of the eighth circuit, where the statute now under consideration was before the court. *Denver & R. G. R. Co. v. Arrighi*, 63 C. C. A. 649, 129 Fed. 347.

In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, and the Federal question presented upon this record is: Was the ruling of the state court in denying the right of recovery upon the ground of contributory negligence, in view of the circumstances shown, such as to deprive the plaintiff in error of the benefit of the statute which made assumption of risk a defense no longer available to the employer? To answer this question we shall have to look to the testimony adduced at the trial, all of which is contained in the record before us. As we have already said, the testimony shows that the plaintiff's intestate was an experienced brakeman. A witness, who is uncontradicted in the record, testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train, instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." He then proceeded to make the coupling, with the result stated.

Another witness, the yard conductor, testified without contradiction, that just before the cars got together he walked up to Schlemmer, and told him they had better shove the caboose on by hand, to which he answered: "Never mind, I will make this coupling." To which the witness answered: "Well, you will have to get down." Witness testified that he called to him twice to get down, the last time not more than a second, possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way: that that was a great deal safer way to make the coupling than backing onto the caboose. The testimony further shows that there was plenty of room under the projection of the shovel car to operate the drawbar and raise it up. In fact, in this manner, the coupling was made a few minutes after the unfortunate occurrence which resulted in the death of the deceased.

As the record is now presented, there is no proof in the case that the deceased was ordered to make the coupling in the man-

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ner he did, and there is testimony to the effect that, just before the injury, the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would.

In view of this record we cannot say that the court, in denying a recovery to the plaintiff, upon the ground of contributory negligence of the deceased, denied to her any rights secured by the Federal statute. Entirely apart from the question of assumption of risk, which, under the law, could not be a defense to the plaintiff's action, as the law then stood, there remained the defense of contributory negligence.

After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the supreme court of the state of Pennsylvania did, that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

As we have said, the Federal question in the record, and the only one which gives us jurisdiction, is: Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative.

The judgment of the Supreme Court of Pennsylvania is affirmed.

RINGER *v.* ST. LOUIS & S. F. R. CO.

(Supreme Court of Kansas, June 10, 1911.)

[116 Pac. Rep. 212.]

Master and Servant—Injuries to Servant—Contributory Negligence.*—An experienced section hand was injured while prying against a rail, by the end of his bar slipping where it rested upon an angle iron used as fulcrum. In an action against the railroad company, based upon the alleged negligence of the defendant in furnishing him an unsafe tool, he testified that he and another hand were directed by their foreman to attempt to line the track, and to hurry up a little as a train was expected; that two bars were immediately available for the purpose, one sharpened in the shape of the letter

*For the authorities in this series on the question whether an employee must, for his own protection, examine his work place, and the tools or appliances with which he is required to work, see note, 14 Am. & Eng. R. Cas., N. S., 807 (duty of employee working on track to be on lookout for trains); *St. Louis, etc., Ry. Co. v. Rogers* (Ark.), 37 R. R. R. 297, 60 Am. & Eng. R. Cas., N. S., 297 (servant need take notice of only such defects as are open to ordinary observation); *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669 (duty of engineer to discover dangerous condition of roadbed, tracks, or bridges, correct instruction as to); *St. Louis, etc., R. Co. v. Phillips* (Ala.), 35 R. R. R. 792, 58 Am. & Eng. R. Cas., N. S., 792 (injured fireman's failure to perform his duty to keep lookout for obstructions near track); *Louisville & N. R. Co. v. Fitzgerald* (Ala.), 33 R. R. R. 577, 56 Am. & Eng. R. Cas., N. S., 577 (failure of engineer to keep lookout required of him, where he would have discovered in time the obstruction on track which caused his injuries); *Laughy v. Bird & Wells Lumber Co.* (Wis.), 31 R. R. R. 242, 54 Am. & Eng. R. Cas., N. S., 242 (extent of employee's duty to inspect for defects); *Southern Ry. Co. v. Isom* (Miss.), 28 R. R. R. 288, 51 Am. & Eng. R. Cas., N. S., 288 (not negligence per se for brakeman to sit upon new kind of brake where he did not know that it differed from other brakes); *McDonnell v. New York, etc., R. R.* (Mass.), 25 R. R. R. 525, 48 Am. & Eng. R. Cas., N. S., 525 (act of engineer in placing ladder against locomotive before directing the fireman to ascend it was not an act of superintendence, relieving the latter from inspecting the security of the ladder); *Beach v. Bird, etc., Co.* (Wis.), 30 R. R. R. 6, 53 Am. & Eng. R. Cas., N. S., 6 (duty of servant to inspect appliance before using it to see if promised repairs have been properly made); *Finley v. Louisville Ry. Co.* (Ky.), 27 R. R. R. 183, 50 Am. & Eng. R. Cas., N. S., 183 (whether servant must inspect his work place); *McDuffee v. Boston & M. R. R.* (Vt.), 29 R. R. R. 467, 52 Am. & Eng. R. Cas., N. S., 467 (servant is not bound to exercise diligence to discover dangers resulting from his employer's negligence); *McDonald v. Michigan Cent. R. Co.* (Mich.), 7 R. R. R. 288, 30 Am. & Eng. R. Cas., N. S., 288 (brakeman injured by reason of defective brake was not required to give it a more minute inspection); *Murphy v. Grand Trunk Ry. Co.* (N. H.), 14 R. R. R. 521, 37 Am. & Eng. R. Cas., N. S., 521 (care required of conductor for his own protection, after a coupling had broken, to discover the cause of the accident); *Barksdale v. Charleston & W. C. Ry. Co.* (S. C.), 8 R.

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"V," the other like a chisel; that previously he had always selected for his own use the former, because it did not slip so badly as the latter; that on the occasion in question he picked up one of the bars without noticing which it was, and did not learn until after his injury that it was that with the chisel-shaped end; that its slipping was caused by the point being worn off about half an inch—a condition that could have been ascertained at a glance. Held, that his use of the bar without any examination whatever, in view of the circumstances stated, amounted to such negligence as to preclude his recovery.

(Syllabus by the Court.)

R. R. 600, 30 Am. & Eng. R. Cas., N. S., 600 (conductor's failure to examine cars before taking them in train was not contributory negligence, where there was a car inspector at the station); *Central of Georgia Ry. Co. v. Price* (Ga.), 19 R. R. R. 246, 42 Am. & Eng. R. Cas., N. S., 246 (duty of freight yard employee to make himself familiar with the excavations and other dangerous surroundings in the freight yard in question); *Atlantic C. L. R. Co. v. Ryland* (Fla.), 18 R. R. R. 834, 41 Am. & Eng. R. Cas., N. S., 834 (duty of section master, or his assistant, to inspect hand car); *Gulf, etc., Ry. Co. v. Moore* (Tex.), 3 R. R. R. 620, 26 Am. & Eng. R. Cas., N. S., 620 (engineer is not bound, for his own protection to keep lookout for defects in track); *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343 (failure of railroad employee unloading freight to see hole in car floor); *Louisville & E. R. Co. v. Poulter* (Ky.), 18 R. R. R. 26, 41 Am. & Eng. R. Cas., N. S., 26 (employee sent to work on scaffold was not bound to inspect it); *Erie R. Co. v. Kane* (C. C. A.), 8 R. R. R. 423, 31 Am. & Eng. R. Cas., N. S., 423 (whether fireman was guilty of contributory negligence in failing to observe rule requiring him to look out for obstructions on track); *Leak v. Carolina Cent. R. Co.* (N. Car.), 14 Am. & Eng. R. Cas., N. S., 739 (failure of servant to discover defect not patent is not contributory negligence); *Hannigan v. Lehigh & H. R. Ry. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 605 (failure of servant to discover defect in appliance when reasonable care would have enabled him to do so).

For the authorities in this series on the subject of the right of an employee to assume that his master or the latter's representative has performed or will perform its duties to him, see last paragraph of first foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; seventeenth head-note of *Grand Trunk W. Ry. Co. v. Poole* (Ind.), 38 R. R. R. 477, 61 Am. & Eng. R. Cas., N. S., 477; sixth head-note of *Hardy v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; third head-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; sixteenth head-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283.

For the authorities in this series on the subject of the contributory negligence of railroad employees injured by structures or objects over or near tracks, see last foot-note of *West v. Chicago, etc., R. Co.* (C. C. A.), 37 R. R. R. 663, 60 Am. & Eng. R. Cas., N. S., 663; last paragraph of foot-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283; second foot-note of *Heilig v. Southern R. Co.* (N. C.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501.

Ringer v. St. Louis & S. F. R. Co

Appeal from District Court, Bourbon County.

Action by W. M. Ringer against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. R. Vermilion, for appellant.

Keene & Gates, for appellee.

MASON, J. W. M. Ringer recovered a judgment against the St. Louis & San Francisco Railroad Company on account of an injury received while in its employ, and the defendant appeals. The essential facts, as shown by the plaintiff's own testimony, may be thus summarized: The plaintiff was a section hand, and had been engaged in that work for over seven years. He and another hand were at work under a foreman, who directed them to take bars and try to line the track, to move it a little to one side, telling them to hurry up a little, and saying he was looking for a train. There were two bars on the hand car on which the tools were carried. One of them, which the plaintiff described as a regular lining bar, was V-shaped at the point; that is, the end was brought to an edge by being dressed equally on opposite sides. The other, which the plaintiff called a "pinch bar," was shaped at the end like a chisel; the edge being formed by dressing one side only. The plaintiff took the pinch bar, and with it cleared some earth from under a rail, placing there an angle bar to serve as a fulcrum. He rested the end of the pinch bar upon the angle bar, and by prying against the rail endeavored to force it to one side, the other hand doing the same with the other bar. The end of the plaintiff's bar slipped upon the angle bar, and in consequence he fell, receiving the injury on account of which he sued. The end or point of the bar used by the plaintiff was worn off about half an inch, making it blunt, and giving it a chance to slip. The conduct of the defendant which is relied upon as negligence is the furnishing the plaintiff with a tool (the bar in question) which was unsafe by reason of the condition stated. There was no difficulty in seeing that the bar was blunt and worn off. The fact could be told at a glance. The bar used by the plaintiff was one which had been left on the side of a dump by an extra gang. They had had it across a bake oven, and it had become bent. The plaintiff something over a year before the accident took it to the shop and had it straightened, and, after that, it was used as one of the tools of the crew with which he worked. He never noticed that it was blunt and worn until after his injury. He knew the difference in the two bars, however, and almost always got the other bar if he could, selecting it because it would not slip so badly as the pinch bar, which he had never before used. On the day of his injury he was in a hurry and took the first bar he got hold of. He did not pay any attention as to

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which bar he took; and he did not look at it, and did not know which he had until after he was hurt.

Upon these facts we are constrained to hold that the plaintiff cannot recover. "The facts and the danger they presented were both within the comprehension of any ordinarily intelligent and prudent man, and were as completely within the knowledge and appreciation of the plaintiff as of his employer. Therefore he cannot recover." *Gillaspie v. Iron Works Co.*, 76 Kan. 70, 90 Pac. 760. The plaintiff had as good an opportunity as the foreman to know of the actual condition of the pinch bar, and his experience enabled him to judge of the effect the wearing away of its point would have upon its slipping. True, he had no immediate opportunity to select any bar other than one of the two upon the hand car, but the defective bar had been for a long time a part of the outfit of tools with which his crew worked and he had had abundant chance to observe its condition. There was no emergency requiring instant action. The foreman's direction to hurry up a little, given because a train was expected, did not prevent the plaintiff's taking note of which bar he was using, and of its condition. The case seems clearly within the line of decisions of which that just cited is an illustration, holding that an employer is not liable for an injury resulting from a danger which is equally obvious to the employee. 34 Cent. Dig. c. 1198, § 611; 13 Dec. Dig. p. 565, § 219 (2); 20 A. & E. Encycl. of L. 130; 26 Cyc. 1202; 1 L. R. A. (N. S.) 948, note; 98 Am. St. Rep. 313, note. An application of the same principle has given expression to the rule that an employer is not liable for a failure to inspect simple tools in common use. 98 Am. St. Rep. 298, note; 1 L. R. A. (N. S.) 948, note; 13 L. R. A. (N. S.) 668, note. In the following cases in which employees sustained injuries through using defective crowbars, recovery was denied upon the ground that the defects were obvious. *Holt v. Chicago, Milwaukee & St. Paul R. Co.*, 94 Wis. 596, 69 N. W. 352; *L. E. & St. L. Con. R. R. Co. v. Allen*, 47 Ill. App. 465; *McBride v. Indianapolis Frog & Switch Company*, 5 Ind. App. 482, 32 N. E. 579; *Vandalia R. Co. v. Adams*, 43 Ind. App. 664, 88 N. E. 353; *Houston & T. C. R. Co. v. Scott* (Tex. Civ. App., 1901) 62 S. W. 1077; *G. W. T. & P. Ry. Co. v. Smith*, 37 Tex. Civ. App. 188, 83 S. W. 719. The line of reasoning followed is indicated by these quotations: "By reasonable attention he would have learned the condition of the bar. By inattention to its condition he took upon himself the risk of there being some defect in it. The consequences of the risk he took are his misfortune. It cannot well be shifted over onto the defendant. If he had observed and discovered the defect, it was negligence to use the bar. If he did not observe and discover the defect, he was negligent in failing to observe and discover it. Such negligence prevents his recovery." *Holt v. Chicago, Milwaukee & St. Paul R. Co.*, supra.

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"The defect was patent. The fact that, as a rule, the master has a better opportunity to inspect the machinery or tools, and must use a higher degree of care than his servant, does not release the servant from exercising care, and this is specially true of so simple a tool as a crowbar placed in the hands of the servant, and which can be as readily, if not more readily, inspected by him than by the master. The statement of appellee that he did not know of the defect is vain, when from his own evidence it appears that the slightest examination would have shown the defective condition." *Vandalia R. Co. v. Adams*, *supra*.

Under circumstances similar in principle to those here presented the ground of the defendant's nonliability is sometimes called "assumption of risk" and sometimes "contributory negligence." Recent notes distinguishing the two defenses are found in 28 L. R. A. (N. S.) 1215, and 18 Am. & Eng. Ann. Cas. 960. A special feature of the plaintiff's testimony in this case makes it clear that his injury was occasioned by his own failure to exercise due care. He knew that there were two bars upon the hand car, differing in the manner in which they were sharpened, and that for some reason one of them was more likely to slip than the other. This matter had been brought to his attention with such distinctness that on account thereof he had always heretofore selected the safer bar to work with. Upon this occasion he picked up the bar which he knew to be more apt to slip, and not only failed to notice its condition, notwithstanding that knowledge, but put it to use without observing which of the two bars he held. He said upon the stand that he supposed that whether or not a bar slipped would depend a good deal on how its point was placed on the angle bar; and this would obviously be true. In using a bar which he knew to be more likely to slip than it should be—than bars used for the purpose usually were—ordinary prudence required that he use it in a manner adapted to its peculiarity. Since he handled it just as though it had been perfectly adapted to his purpose, without giving it enough attention to observe a characteristic which he knew existed, and which rendered it less safe than the other, he was manifestly not exercising reasonable care for his own protection. His knowledge that there was a difference in the two bars—a difference affecting their relative safety—placed him under an additional obligation to take notice of the one he was using, to inspect it sufficiently to ascertain which of the two it was.

The judgment is reversed and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

BALTIMORE & O. R. CO. v. TAYLOR.

(Circuit Court of Appeals, Fourth Circuit, March 31, 1911.)

[186 Fed. Rep. 828.]

Negligence—Questions for Court or Jury.—Questions of negligence do not become questions of law for the court, except where the facts are such that all reasonable men draw the same conclusion from them; the court being unauthorized to withdraw the case from the jury unless the conclusion follows as a matter of law that no recovery can be had on any view which can be properly taken of the facts the evidence tends to establish.

Master and Servant—Death of Servant—Railroads—Defective Roadbed—Negligence—Question for Jury.—In an action for the death of a railroad engineer by the collapse of a part of the roadbed as he was passing over it at night, evidence held to require submission of defendant's negligence to the jury.

Master and Servant—Death of Servant—Railroads—Maintenance of Way—Duty of Railroad Company.*—A railroad company is bound to use reasonable care to make and maintain its roadbed in a reasonably safe condition for the use of trainmen in operating trains over it, and if it is negligent in this regard, and by reason thereof a trainman is killed while at his post of duty, the railroad company is liable.

Death—Wrongful Death—Damages—State Law.—Where a railroad engineer was killed in West Virginia owing to the collapse of a portion of the railroad company's roadbed, due to the latter's negligence, an instruction that if plaintiff was entitled to recover the jury should find for her such damages as they might deem fair and just, not to exceed \$10,000, was authorized by Code W. Va. c. 103, §§ 5, 6, creating a right of action for wrongful death, and declaring that in every such action the jury may give such damages as they shall deem fair and just, not exceeding \$10,000.

Master and Servant—Death of Servant—Railroads—Operation—Assumed Risk.†—Decedent, a railroad engineer, who was killed by the collapse of a portion of a fill while he was operating a train over the same at night, did not assume the risk of the safety of the track, unless he knew its dangerous and defective condition, or unless it was so open and obvious that he would be presumed to have knowledge thereof.

Master and Servant—Injuries to Servant—Defective Roadbed.‡—It is the duty of a railroad company to see that its tracks are main-

*See third paragraph of first foot-note of *Korah v. Chicago, etc., R. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493.

†See second foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; last foot-note of *Smith v. Chicago, etc., Ry. Co.* (Kan.), 36 R. R. R. 640, 59 Am. & Eng. R. Cas., N. S., 640.

‡See third foot-note of *Hardy v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; first head-note

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tained in a reasonably safe condition, and if a track, though originally constructed in a safe manner, becomes dangerous, and such dangerous condition was not known to an engineer using the track and was not obvious, it did not devolve on him to examine the road, but he could presume that the railroad company had performed its duty, and if it knew or could have known by reasonable care of the unsafe condition of the roadbed, and the engineer was exercising ordinary care when he was killed without knowledge of the defect because of the unsafe condition of the track, the railroad was liable therefor.

Master and Servant—Death of Servant—Railroads—Notice of Danger.—Decedent, a railroad engineer, was killed by the derailment of his engine owing to the collapse of a portion of a fill which had become water-soaked during a freshet. The railroad company for three days prior to the accident had suspended operations over the division in question except for work trains, and on the fourth day, on which decedent was killed, operated trains only under special telegraphic orders. On approaching a station and before reaching the fill, decedent received a telegraphic order informing him that the fill was settling and to "run slow." Defendant's trackmen at the point in question, some time prior to the arrival of decedent's train, had knowledge that the fill was in a dangerous condition and that the earth was washed out under the ties; but no effort was made to protect decedent's train or to give him any further warning of the danger, though this might easily have been done by signal. Held, that decedent's telegraphic order was not such a warning of the danger as to charge him with notice of the dangerous condition of the track.

Master and Servant—Death of Servant—Railroads—Contributory Negligence.—In an action for the death of a railroad engineer by the collapse of a fill, whether he violated his orders to "run slow" over the fill held for the jury.

Master and Servant—Death of Servant—Defective Roadbed—Care Required.—Where decedent, a railroad engineer, was killed by the collapse of a fill, and there was evidence that the fill was improperly constructed in the first instance, and that, prior to ordering decedent to take a train over the track, the railroad company had knowledge that the fill was sinking and was in a dangerous condition, such facts were sufficient to justify a finding that the railroad company in the exercise of ordinary care should have kept a watchman at that point day and night in order to observe and record any change in the fill and notify the operatives of trains approaching the same of its condition.

of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; last foot-note of *Grand Trunk W. Ry. Co. v. Poole* (Ind.), 38 R. R. R. 477, 61 Am. & Eng. R. Cas., N. S., 477; third foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; first foot-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283.

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Master and Servant—Injuries to Servant—Fellow Servants.§—Whether a servant, by whose negligence another servant is injured, is a fellow servant, depends on whether the negligent servant was engaged in performing a nonassignable duty of the master or the work of an ordinary servant.

Master and Servant—Death of Servant—Railroads—Engineer and Track Foreman—Fellow Servants.||—Where decedent, a railroad engineer, was killed by the collapse of a fill owing to the negligence of a track foreman employed to superintend the work of maintaining the roadbed and keeping it in proper repair, decedent and such foreman were not fellow servants.

Master and Servant—Death of Servant—Assumed Risk—Burden of Proof.||—In an action for the death of a railroad engineer by the collapse of a portion of the roadbed, the burden of proving assumed risk, and that decedent had knowledge of the extraordinary danger, was on the railroad company.

Master and Servant—Contributory Negligence—Burden of Proof.—In an action for death of a railroad engineer by reason of a defect in a track, the burden of proving contributory negligence was on the railroad company.

Master and Servant—Death of Servant—Defenses—Act of God—Contributory Negligence—Instructions.—In an action for the death of a railroad engineer due to the collapse of a portion of a fill owing to high water, the court properly charged that if decedent's death was caused by an act of God, to wit, the extreme flood and winds causing the fill to settle and become undermined, which condition reasonable care and attention by defendant could not discover or repair, or decedent's death was caused by contributory negligence, or both causes combined, plaintiff could not recover.

Master and Servant—Death of Servant—Railroads—Operation.—In an action for the death of a railroad engineer by the collapse of a portion of a fill, the court properly charged that if the sons of the watchman in charge of the watch box near the fill were notified of the dangerous condition, and, neither of them knowing of the approaching train, one went to notify his father and the other to notify the telegraph operator, and both acted as promptly as possible to prevent any accident or damage to passing trains, such facts should be considered in connection with the other evidence on the question of the railroad company's negligence.

§For the authorities in this series on the question whether a foreman or superior servant was acting as a fellow servant or vice principal on a certain occasion, see foot-note of *Cleveland, etc., Ry. Co. v. Foland* (Ind.), 37 R. R. R. 637, 60 Am. & Eng. R. Cas., N. S., 637; second foot-note of *Delaware, etc., R. Co. v. Royce* (C. C. A.), 36 R. R. R. 217, 59 Am. & Eng. R. Cas., N. S., 217.

||See first foot-note of *Chicago, etc., Ry. Co. v. Barker* (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228.

¶See last foot-note of *Ross v. Chicago, etc., Ry. Co.* (Ill.), 35 R. R. R. 41, 58 Am. & Eng. R. Cas., N. S., 41.

Baltimore & O. R. Co. v. Taylor

In error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Action by Hettie G. Taylor, as administratrix of Harry B. Taylor, deceased, against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action instituted by the administratrix of Harry B. Taylor, deceased, against the Baltimore & Ohio Railroad Company in the circuit court of Wood county, W. Va., from which it was removed to and tried in the Circuit Court of the United States for the Northern District of West Virginia; trial resulting in a judgment for the plaintiff, to which this writ of error has been sued out by the defendant company.

The cause of action is based upon the death of the plaintiff's decedent by the alleged negligence and wrongful acts of the defendant company. Taylor was an engineer in the employ of the railroad company. At the time of his death he had been in such employ as engineer more than five years, having been promoted from the position of fireman. He was 33 years old, was a strong, vigorous man, in good health, of temperate habits, and good character, and left surviving him a wife and one child, a boy $2\frac{1}{2}$ years old.

The railroad company at the time was operating among its other lines one extending from Wheeling to Kenova, in West Virginia, a distance of over 200 miles wholly along the banks of the Ohio river. In January, 1907, the operation of this line of road had been greatly impeded by the high waters of this river, and for the three days prior to the 22d of this month operations had been altogether suspended except as to work trains engaged in the repair. On the 22d, however, the waters had so far receded that operations had been resumed and trains were running under special telegraphic orders between the stations of Parkersburg and Point Pleasant, a distance of about 80 miles, in or near the middle of the line. At or about 1 o'clock in the afternoon of the 23d a special train, consisting of engine, tender, and 27 freight cars, some of which were loaded with steel rails, was ordered out of Parkersburg yard to proceed down the river or south toward Point Pleasant, subject solely to telegraphic orders. Taylor was engineer on this train. His train arrived at Ravenswood, 33 miles below Parkersburg, some time after 6 o'clock, where orders 25 and 67 were received by its conductor and Taylor, the engineer. Order No. 25 directed reduction of speed to 10 miles per hour between certain points set forth, to 6 miles per hour between certain other points, and then set forth: "Fill at bridge just east of Longdale is settling. Run slow. No water at Letart or Spillman." The station of Letart was 16 miles below Ravenswood and was a telegraphic one. When the train arrived

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there, the white signal was displayed, indicating that its block was clear, no orders were there for it, and that it was at liberty to go ahead. Some $2\frac{1}{2}$ miles below Letart (sometimes spoken of as south and sometimes west in the record) was a fill, some 150 feet long and 30 feet high, in the deepest place, which had originally been a trestle; but in 1901 a stone or concrete arched culvert had been put in to allow a small stream to pass through, and the place had been then filled with sand, gravel, and other earth material. Backwater from the river through this arch had filled the low ground both above and below this fill to within a few feet of its top. When Taylor's train reached this fill, it was running at a speed variously estimated at between 10 and 15 miles an hour. When the engine went on it, the fill sank, "squashed out," as the witnesses expressed it, the rear of the engine sank down and overturned, killing Taylor, his fireman, and a brakeman who were at the time on the engine.

The allegations in the declaration in effect charge the railroad company with negligence, in that it did not use due and proper care in maintaining this fill and its roadbed there in a safe and proper condition; did not make proper inspection and tests to ascertain its unsafe and dangerous condition; did not employ suitable and sufficient servants to keep and maintain it in such safe condition; furnished to decedent an unusually large, heavy, and unsuitable engine to operate his train upon the then known condition of the roadbed; that it neglected to inform Taylor thereof, as it could have done in time to avoid the accident, but, on the contrary, displayed the white signal to him at Letart, which directed him in effect to proceed with assurances of safety.

A demurrer to this declaration was entered and overruled by the court below, and the defendant entered a plea of not guilty; its defense being in effect a general denial of liability, an assertion of disobedience of orders by decedent, and contributory negligence and assumption of risk on his part.

A trial by jury was had, a verdict for \$10,000 damages rendered, a motion to set aside which was made and overruled, numerous exceptions to rulings of the court and to instructions given and refused were taken, and the case is now here for review upon 22 assignments of error.

B. M. Ambler and *J. W. Vanderwort* (*Van Winkle & Ambler*, on the brief), for plaintiff in error.

Lewis N. Tavenner (*I. B. Archer*, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). As appears from the statement of facts, it is insisted by the de-

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fendant below: (a) That the evidence was not sufficient to sustain a verdict against the defendant; (b) that the decedent assumed the risk incident to his employment; (c) that his own negligence contributed to the cause of his death.

[1] The first assignment of error relates to the refusal of the court below to direct a verdict in favor of the defendant. The general rule bearing upon this point is well stated in the case of *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. In that case the court, among other things, said:

"Questions of negligence do not become questions of law to be decided by a court, except 'where the facts are such that all reasonable men draw the same conclusion from them,' and the case is not to be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

[2] The evidence in this case is such that reasonable men might reasonably differ as to the inferences to be drawn therefrom, and, under these circumstances, we do not deem it necessary to enter into an extended discussion of the facts at this juncture in determining this point, further than to say that a careful consideration of the same leads us to the conclusion that the refusal of the court below to direct a verdict in favor of the defendant was eminently proper.

[3] The second assignment of error is as to instruction No. 2. In this instruction the court told the jury that it was the duty of the defendant company to exercise reasonable care and diligence to make and maintain its track and roadbed in a reasonably safe condition for the use of the engineer in running locomotives over it, and that if the jury believed from the evidence that the defendant company, its agents or servants, had neglected to keep its track, roadbed, and fill in a safe condition, and that by reason of such negligence on the part of the defendant company the plaintiff's decedent was killed by the derailment of his engine while at his post of duty, in the service of the railroad company, then in that event the defendant company would be guilty of such wrongful act, neglect, and default, and the plaintiff would be entitled to maintain her action, and that the jury should find for the plaintiff such damages as they might deem fair and just, not to exceed the sum of \$10,000. The following citations sustain this instruction of the court: *Searle v. Railroad Company*, 32 W. Va. 370, 9 S. E. 248; *Long Pole Lumber Company v. Gross*, 180 Fed. 7, 8, 103 C. C. A. 359; *Turner v. Norfolk & Western Railway Company*, 40 W. Va. 675, 22 S. E. 83; 3 *Elliott on Railroads*, § 1297, p. 2046.

[4] That portion of the instruction in which the court told the jury that the plaintiff would be entitled to recover such sum as they might deem fair and just, not exceeding the sum of \$10,000,

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was based upon the law of the state of West Virginia. Code of West Virginia, c. 103, §§ 5 and 6, read as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first degree, or manslaughter."

"Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars."

While the court instructed the jury that in no event would the plaintiff be entitled to recover a sum in excess of \$10,000, yet the question as to the actual amount of damages the plaintiff was entitled to recover, under the pleadings and evidence, was properly left to the determination of the jury.

[5, 6] The third and fourth assignments of error pertain to the rulings of the court below in giving instructions 4 and 5, as requested by the plaintiff. Instruction No. 4 relates to the assumption of risk. The court instructed the jury that when the engineer entered the service of the company he did not undertake to assume the safety of the defendant company's track, roadbed, and fills, unless he knew the defective and dangerous condition, or unless the same were so open and obvious that he would be presumed to have knowledge of them. That he did not by virtue of his contract of employment assume any risk incidental to the use of a defective track, or defectively constructed fill, or defective fill, of which defect he was ignorant, unless such defects and imperfections were open to observation, and in that event he would be presumed to know of them.

The court also instructed the jury that it was the duty of the defendant company to see that its tracks were constructed in a reasonably safe manner and maintain in a reasonably safe condition at the place of the casualty. If the track and fill although originally constructed in a safe manner became unsafe and dangerous from any cause subsequently occurring, and the unsafe and dangerous condition of the same was unknown to the deceased and was not obvious and open to observation, that it did not devolve upon the deceased to examine and inspect the road and fill to ascertain any defects, but that he had the right to pre-

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sume that the defendant company had performed its duty in respect to maintaining the tracks and fill in a reasonably safe condition.

In the fifth instruction the court stated to the jury that if they should find from the evidence that the track or fill at the place of the casualty were not kept in a reasonably safe condition for use by the engineer, whose duty required him to use said track at the time he was killed by the derailment of his engine, and further that if they should believe from the evidence that the defendant railroad company knew, or might have known, by the exercise of reasonable care and prudence, of the defective and unsafe condition of the roadbed and fill, and if they should further believe from the evidence that the deceased was exercising reasonable and ordinary care for his own safety at the time he was killed and that he had no knowledge of the defect and danger, either actually or presumptively, as stated in the fourth paragraph of the instruction, and that his death resulted from the unsafe condition of the track, then the plaintiff would be entitled to recover such damages as the jury might deem fair and just, not exceeding the sum of \$10,000.

This instruction very clearly shows the extent to which the deceased assumed the risk incident to his employment, and also properly defines the law as respects the duty the defendant company owed him in the construction and maintenance of its track, and, under these circumstances, we think, is fully sustained by well-established precedents. 4 Thompson, Negligence, §§ 3772, 4261; Long Pole Lumber Company v. Gross, 180 Fed. 7, 8, 103 C. C. A. 359; Patton v. Southern Railway Company, 82 Fed. 979, 27 C. C. A. 287.

[7] It is insisted by counsel for the defendant company that order No. 25, which was delivered to the deceased about two hours before his death, warned him of the risk and danger involved in the trip he was about to make, and that therefore he assumed the same.

It appears from the statement of facts: That at the time this accident occurred the operation of this line had been greatly impeded by the high waters of the Ohio river, and that for three days prior to the time of the accident operations had been altogether suspended except the work trains engaged in repair work. On the 22d the water had so far receded that trains were allowed to run under special telegraphic orders between the stations of Parkersburg and Point Pleasant, a distance of about 80 miles, in and near the middle of the line. That at or about 1 o'clock on the afternoon of the 23d a special train, consisting of an engine, tender, and 27 freight cars, some of which were loaded with steel rails, was ordered out of Parkersburg yard to proceed down the river or south toward Point Pleasant, subject solely to telegraphic orders. The deceased was engineer on

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this train. When the train arrived at Ravenswood, some time after 6 o'clock, the conductor and engineer received orders Nos. 25 and 67. By order No. 25 the engineer was directed to reduce speed to 10 miles an hour between certain points and to 6 miles an hour between certain other points. Then appeared the following:

"Fill at bridge just east of Longdale is settling. Run slow. No water at Letart or Spillman."

Notwithstanding the fact that the engineer was directed by this order to run slow at the point where the accident occurred, yet there was no evidence offered by the defendant to show what the words "run slow" were intended to mean. To "run slow" is an indefinite expression, and, in the absence of any evidence as to the interpretation to be given the same, it necessarily follows that the expression means that the engineer is to exercise his own discretion as to the rate of speed he is to run his engine, and this, of course, would depend very much upon the character of the road over which he might be operating his train. For instance, if an engineer should be given instructions to run slow, he would naturally run much slower where the grade was heavy and where slides were likely to occur than he would in a level tract of country where the conditions were altogether different.

It is contended by counsel for plaintiff that, if the defendant company had exercised reasonable care in the inspection of the fill at this place, it could have discovered its unsafe condition, and that had it been in possession of such knowledge it would have limited the speed at that point, so as to avoid the danger to which the engineer was exposed, in the same manner that it did with respect to the other points mentioned in the order, and that therefore the accident was due to the failure on the part of the defendant company to exercise reasonable care in properly inspecting and maintaining its roadbed at this point.

It is admitted that there had been a freshet which had completely submerged the company's track at many points along its line. The fact that the company had ordered its trains run under special telegraphic orders shows that it had knowledge as to the dangerous condition of its track. This was sufficient to put the company upon inquiry as to any defects of construction and any changes that were likely to occur in the condition of the track, and to require at its hands the exercise of reasonable care and caution in maintaining and keeping its roadbed in proper repair.

As we have stated, the deceased assumed the ordinary risk incident to his employment; but, on the other hand, it has been repeatedly held that the servant does not assume any risk occasioned by the negligence of the master except such as are open and obvious or as to the existence of which he has knowledge.

It is alleged in the declaration that the railroad company was

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negligent, in that it failed to keep the fill at the bridge where the accident occurred in a reasonably safe condition. The duty to keep its roadbed, fills, etc., in good repair and in a reasonably safe condition is imposed upon the master, and this is one of the non-assignable duties—a duty which devolves upon the master at all times, and the failure to perform this duty has invariably been held to be negligence. That the company had notice of the unsafe condition of this fill during the early part of the day on which the accident occurred is shown by the evidence. It is true that Section Foreman Finicum testified that he had two or three hands there at work and had done what he could to repair the fill, yet there is evidence which tends to show that the work which was done on that occasion was not of such a character as to strengthen the fill.

A. C. Brown, a witness for the plaintiff, among other things, testified as follows:

"I saw the fill while it was being made. The material of which it was made looked to me like red mud, or red clay. I was there seven or eight times while they were filling it."

Witness Wolf, in referring to the manner of construction of the fill, also testified as follows upon cross-examination:

"About all they had there was some gravel on top of the main arch along this fill. There had been some gravel, and you could just see the red mud from the top. It was not red mud that they put under the ties; the red mud was under that, and they put it there. I stayed up that night to see this train cross there knowing of the water being up, and knowing the conditions of that place it caused me to stay up."

This witness also testified further as follows:

"* * * I was not present when the fill was constructed. I saw it after it was torn down; I could see the material. Never worked at building bridges or fills. I do not speak altogether from the condition of the fill after the train had gone over it. I would not have considered the fill sufficient for a good public road and I have done some road building."

Hiram Rollins, a witness for the plaintiff, also testified as follows:

"I reside at Letart, which is between two and three miles from the fill this side of Longdale. On the night of January 23, 1907, I passed over that fill going down in the forepart of the day near noon, and I came up after night, after the evening train had just passed over. About noon the fill was inundated with water and looked like a part of the track was settling, but the track was out of water from the top of the fill; that is, the rail down to the water, about noon, was about six feet. A couple of men were not far from the fill, Wynn Boston and Clark Ahrnt. They were trackmen; had shovels working on the road. In the evening I had been to Racine, Ohio, after a casket for a child, and

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was waiting for the evening train. The train did not come. I left the outside box and carried the casket. That is the way I came to walk over there in the dark with it. But the moon was shining. It was light enough to see to walk without a light. The fill at that time was impassable. It had slipped out and left about two rails bare to the side of the track. I had to walk on one side next to the river to keep from slipping down into it. The dirt had left the ties and slipped into the water on the side next to the river. The ties were supported by the earth, if they had any support. I hurried on up to the watchhouse and informed the watchman of the condition of the place, and 'to protect it from life and limb.' I was not a railroader, but I knew he ought to know how to protect that hole when he would find out it was there. I found the watchman and others there. I called for the watchman, and he came to the door. I gave him notice of the fill being out of shape for the train to go over it, and told him to protect it. He failed to do that, or he would have kept the train out of it. I knocked at the door and called for the watchman. He came to the door. There was three or four in there, and he informed who he was, and I told him that the fill was giving away, and to go down and protect it. He started up the road to do something he was told to do. I only told him what I had seen. I didn't know that the train was coming, and I do not know whether he did or not. * * *

Geo. W. Delinger, a witness for the plaintiff, also testified as follows:

"I had been at the watch box before the accident with Floyd Finicum Henry Delinger, and Henry Finicum. We were having a game of seven-up, playing cards. Hiram Rollins came along and told us, Mr. Finicum, the watchman, that the fill was out of shape; that it was gone for about two lengths middleways of the ties—that is, that the fill had gone in the river two rail lengths to about middleways of the ties. Finicum said he would go home and tell his father about it. Mr. Finicum was employed as a watchman. He was employed to work on the road and was watching at the time. He said that his father told him if anything happened for him to come and let him know. I told him I would go and tell his father, and he said no, that he would go. His father was section foreman, and this son was acting as watchman. I said to him what if a train comes down while you are gone over there, and he said, 'Let her go to hell.' He went on home up the track; passed our house, and I went on up the track to our house. I was not with him after that. He did not leave a lantern sticking or hanging at the watch box."

Notwithstanding the condition of the fill owing to the recent rains, Finicum made no further inspection at this point after 11:30 a. m., but contented himself by having Mr. Boston go about 6 o'clock in the afternoon, who reported that it was not

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necessary to have a guard or watchman about the fill. He pursued this course despite the fact that it was his duty as section foreman to keep the track in good repair and to observe any change that might occur at the fill on account of the high waters.

Instead of remaining there or having some one go to the fill at stated intervals to observe any change in the condition of the same, the foreman left his son at the watch box with instructions that "if anything happened to let him know." This young man, in utter disregard of the orders which had been given him by his father, in company with some of the neighbor boys, was in the watchman's house engaged in a game of cards, paying no attention whatever to the condition of the fill. While he and his boon companions were whiling away the hours at a game of cards, the unfortunate engineer was rushing on to sudden death, without the slightest warning or intimation as to the impending danger that awaited him. Before the accident occurred and when the watchman had ample time to flag the approaching train, or go to Letart and notify the agent, he, in company with one of his companions, walked up the track in the direction his father lived, without displaying a lantern or any other signal to indicate the condition of the fill, and made not the slightest effort to stop the ill-fated train. When his companion said to him, "What if a train comes along while you are gone over there," his only comment was, "Let her go to hell."

In dealing with the case of the Long Pole Lumber Company v. Gross, 180 Fed. 7, 8, 103 C. C. A. 365, which is somewhat analogous to the case at bar, this court said:

"If, in approaching the bridge, the engineer saw or could have seen, or had knowledge of, the defective condition of the bridge, then under such circumstances the doctrine of assumed risk would apply. Under the foregoing instruction the question as to whether the plaintiff had knowledge of the dangerous condition of the bridge was submitted to the jury, and the jury by its verdict determined that question in favor of the plaintiff."

In determining this question, we should keep constantly in mind the distinction between a negligent act of operation and the negligent act of the defendant company in failing to perform its duties of construction and maintenance. In the case of Texas & Pacific Railroad Company v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the court said:

"An employee of a railroad company has a right to rely upon this duty (to furnish safe cars) being performed, as, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished."

It is true that the engineer was notified that the fill at this point was "settling" and that he must "run slow;" but there was

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no intimation or suggestion that the fill was likely to give way under the weight of the train. Nor was there any suggestion that at 9 o'clock the condition of the fill was such as to require the presence of the section foreman and his hands, and there was no warning given him by the company to the effect that the fill had become a veritable death trap at the time Rollins passed over it. If the engineer had known the condition of the fill at that time, and he, notwithstanding his knowledge of its condition, had run his train upon it, he would undoubtedly have assumed any risk incident thereto. Instead of the engineer being notified as to the condition of the fill, he was permitted to run his train over the same at a time when he was in utter ignorance as to its condition.

General Superintendent Loree testified that he passed over this fill at 7:30 on the date of the accident. Among other things, he said:

"I did not pay very much or any particular attention to the speed over the fill itself, but I think we were probably going eight or ten miles per hour."

John F. Taylor, engineer on the train on which General Superintendent Loree was riding, testified, among other things, as follows:

"On January 23, 1907, I was on train 719 and passed over this fill east of Longdale at a rate of speed, I judge, between eight and ten miles an hour. Mr. Loree was on that train. There seemed to be nothing wrong with the fill when I went over it. I had this same order No. 25 that day. I passed over this fill between 7 and 7:30. It was dark. I slowed down when I came to it. I am still in the employ of the company."

Here was another train which the defendant company operated under order No. 25, and the engineer in charge testified that when he reached the fill he "slowed down" and only ran at a rate of between eight and ten miles per hour, which is important as throwing light upon what might be termed "running slow" under the order in question.

[8] While some of the defendant company's witnesses testified that the train was running at the rate of 15 miles an hour, yet other witnesses for the plaintiff testified that the ill-fated train was not running over 10 miles per hour at this point. However, in the absence of proof as to what rate of speed could be properly termed "running slow," it was impossible for the court to give the jury any standard by which it could be guided in determining whether the engineer violated the instructions contained in order No. 25 in attempting to cross the fill. In view of the nature of this order in this respect, it should be borne in mind that there was conflicting evidence as to this point, and the court very properly submitted this matter to the jury for its determination.

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There is also evidence tending to show that the fill was not properly constructed in the first instance, and this evidence bearing upon the question as to whether the defendant company properly constructed the same was submitted to the jury by the court below. According to the evidence of witnesses Rollins, Wolf, and Brown, the fill had settled to such an extent that it would have gone down under the weight of cars heavily loaded (as many of them were) regardless of the rate of speed at which the train was running.

In the sixth instruction, to which exception was taken by the defendant, the court instructed the jury that a casualty occurring from a defective track is not one of the ordinary perils which, in presumption of law, the plaintiff's decedent voluntarily assumed when he took service with the defendant railroad company; and that the ordinary care in respect to the safety of its tracks and fills, which the law put upon the defendant railroad company in favor of its servant, varied with the risk or danger; and that the care, in order to be deemed reasonable, must increase as the risk increases, and diminish as the risk diminishes; and that the law exacts an increased degree of care from a railroad company in making provision against the increased risk arising by reason of the railroad being built through lands liable to flood or backwater; and that if they believed from the evidence that the defendant railroad company's track and fill were at the place of the casualty constructed through and upon ground where the track and fill became liable to be affected by floods or backwater, and if they believed further from the evidence that by reason thereof the track and fill became depressed, sunken, and unsafe, and if they believed further from the evidence that the engine on which the plaintiff's decedent was employed as engineer was derailed by reason of the defective condition of the track and fill, and that the plaintiff's decedent was in the exercise of reasonable care on his part, and that by reason of the failure of the railroad company to exercise reasonable care in either constructing its railroad and fill at the place of the casualty in a reasonably safe manner, or in its failure to keep its railroad and track in a reasonably safe condition and repair, then, if they should believe from the evidence that the death of Harry B. Taylor resulted from the unsafe condition of the track and fill, the plaintiff is entitled to recover.

[9] That the defendant railroad company should have exercised great care and caution owing to the condition of its track, roadbed, and fill, as a result of the high waters prevailing at that time, is undoubtedly true. With the knowledge the defendant company had as to the condition of this fill the jury might have found that the company should have kept a watchman at that point day and night in order that any change in the fill might be observed so as to notify the conductors and engineers

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of any trains that might be passing over that track while it was in that condition, and the court very properly submitted the question to the jury as to whether the defendant company, under the circumstances, exercised reasonable care and caution in keeping its track, roadbed, and fill at this point in proper repair.

[10] It is also insisted that if there was any negligence it was that of a fellow servant. As we have already stated, the duty of proper construction and maintenance of the roadbed devolved upon the master, and this is a nonassignable duty. In the case of *Long Pole Lumber Company v. Gross*, supra, this court, in referring to this point, said:

"The rule of the federal court, as I understand it, as to fellow servants, is that, with regard to such employees as we are considering in this case, it depends on what the negligent servant was doing; that is to say, that, if the servant from whose negligence the plaintiff suffers was engaged in performing a nonassignable duty of the master, he is not a fellow servant of the plaintiff."

[11] The court in that case, in his instruction to the jury, correctly stated the law as respects the doctrine of fellow servant. In this instance it was the duty of Finicum, the foreman, to superintend the work of maintaining the roadbed and keeping it in proper repair. It also appears that, independent of the knowledge that Finicum had as to the condition of the fill, the company had actual knowledge of the condition of the same owing to the unusual high waters that had prevailed in that region. Under these circumstances, it cannot be said that the failure on the part of the roadmaster, whose duty it was to properly maintain the same, can be pleaded as a defense to this action upon the ground that it was the negligent act of a fellow servant.

[12] It is also insisted that the court erred in giving instruction No. 7, which is in the following language:

"The court instructs the jury that the burden of proof as to the assumption of the risk and the knowledge of the extraordinary danger to the plaintiff's decedent, Harry B. Taylor, is upon the defendant railroad company."

It has been repeatedly held that in a case like the one at bar the burden is upon the master to show that the servant knew of the defects or dangerous condition of the track, roadbed, and fill, or that the dangers were so open and obvious that he would be presumed to have had knowledge of them. In the case of *Pennsylvania Railroad Company v. Jones*, 123 Fed. 758, 59 C. A. 892; Judge Gray, in speaking for the court, said:

"The view we take of the case presented by the record, in short, is this: The jury was warranted in finding that the situation maintained by the defendant below at the locus in quo of the accident was not a reasonably safe one, according to the requirements of the law in that behalf, and, as negligence of

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the master is never one of the risks assumed by the servant, the conclusion that defendant was guilty of negligence, or, in other words, had failed in its duty to decedent, would inevitably follow, unless the affirmative defense is established that decedent was fully informed as to the danger arising from such negligence, or that the same was so obvious that he ought to have been informed thereof; in which case, whether he be said to have assumed the risk, or have waived the negligence of his employer, or to have been guilty of contributory negligence in voluntarily exposing himself to such danger, the defendant is not liable. The determination of this fact was properly left to the jury, and we are not disposed to criticise the conclusion to which the jury in this case came, much less to say that it was one that should have been set aside by the court below. We cannot say, as a matter of law, that plaintiff was either guilty of contributory negligence, in not abandoning the train and refusing to occupy the station assigned him, or that by remaining there, under the circumstances disclosed by the record, he assumed the risk of the situation created by the plaintiff's default."

The foregoing case is analogous to the case at bar, and, applying the rule announced therein, we are of opinion that the court below did not err in holding that the burden of proof in this respect was upon the defendant.

The next contention is to the effect that the court below erred in giving instruction No. 9 at the instance of the plaintiff. This instruction clearly states the law as to the duty of the plaintiff to maintain its roadbed and keep it in reasonable and safe repair, and the court also instructed the jury that the plaintiff could not recover if they believed from the evidence that Harry B. Taylor was guilty of contributory negligence in remaining on the engine after he knew of the defective and dangerous condition of the track, and in continuing to run the engine over such defective and dangerous portion of the railroad track and fill, or if they believed from the evidence that the defects and dangers were so open and obvious that he would be presumed to have had knowledge of them. Then the court further instructed the jury that contributory negligence on the part of the engineer would not exonerate the defendant railroad company and disentitle the plaintiff from recovery if they further believed from the evidence that the defendant railroad company might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

[13] In instruction No. 10 the court instructed the jury that contributory negligence is a defense, and that the burden of proof upon the issue as to contributory negligence in this case rested upon the defendant railroad company. This instruction is sustained by numerous decisions, especially those of the courts of Virginia and West Virginia, as well as the courts of the

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United States. In the case of *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, paragraph 4 of the syllabus is in the following language:

"That the burden of proof was on the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury."

In the case of *Hough v. Railway Company*, 100 U. S. 213, 25 L. Ed. 612, Justice Harlan, in speaking for the court, said:

" * * * That the engineer knew of the alleged defect was not, under the circumstances, and as a matter of law, absolutely conclusive of want of due care on his part. *Ford v. Fitchburg Railroad Company*, 110 Mass. 261 [14 Am. Rep. 598], *Laning v. N. Y. C. Railroad Company*, 49 N. Y. 521 [10 Am. Rep. 417]. In such a case as that presented, the burden of proof to show contributory negligence was upon the defendant. *Railroad Company v. Gladmon*, 15 Wall. 401 [21 L. Ed. 114]; *Wharton, Negligence*, § 423, and authorities there cited in note 1; *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S. 291 [23 L. Ed. 898]."

It is insisted that the court erred in giving instruction No. 11. This instruction relates to the duty the railroad company owed the deceased in giving notice of the increased danger. An examination of the same leads us to the conclusion that it was not prejudicial to the rights of the defendant railroad company.

[14] In instruction No. 14 the court instructed the jury that if they should find from the evidence that the death of the plaintiff's decedent was caused either by the act of God, to wit, the extreme flood and winds causing said fill near Longdale to settle and become undermined, which condition reasonable care and attention by the defendant could not discover or repair, or that said death was caused by the contributory negligence of the plaintiff's decedent or by the two causes combined, to wit, by contributory negligence of plaintiff's decedent, and by extreme flood and winds, and was not caused by the negligence of the defendant company, then the jury must find for the defendant.

We think the court fairly presented the two propositions to the jury and very properly left the same to its determination.

[15] In instruction No. 15 the court instructed the jury that if they should find from the evidence that Floyd Finicum and his brother, Harry, were notified at the watch box in what is known as the Narrows about a mile west of Letart, by Rollins about 8 p. m. that the fill east of Longdale was settling, and at that time said Finicum was watchman at the Narrows, and that neither of them knew of the approaching train, but that one of them went within a few minutes to notify John Finicum, section foreman, and the other to notify the operator at Letart, and that both parties acted as promptly as possible to prevent any accident or damage to passing trains, all of these facts should

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be considered by the jury in connection with all the other evidence in the case, upon the question of negligence or want of care upon the part of the defendant company.

We think that the court very properly submitted this phase of the question to the jury to be considered by it along with the other questions involved in this controversy.

We have carefully examined and considered the cases relied upon by the plaintiff in error; but we are of opinion that the facts of this case are such that those decisions do not apply to the questions involved herein.

An examination of the assignments of error as to the refusal of the court below to give certain instructions and modify those given leads us to the conclusion that there is no prejudicial error.

When we consider the peculiar circumstances surrounding this case and the many interesting points involved, we are impelled to the conclusion that by the trial of this case substantial justice has been obtained.

For the reasons herein stated, the judgment of the lower court is affirmed.

SWISHER *v.* INTERURBAN RY. CO.

(Supreme Court of Iowa, March 11, 1911.)

[130 N. W. Rep. 404.]

Railroads—Operation—Injuries to Animals—Statutory Provision—"Railway."—Code, § 2072, requiring a bell and a steam whistle to be placed on each locomotive engine operated on any railway, and the whistle to be sounded 60 rods before a highway crossing is reached, and the bell to be rung from that time continuously till the crossing is passed, is made applicable to electric interurban railways by Acts 29th Gen. Assem. c. 81, § 2 (Code Supp. § 2033b), providing that the word "railway," as used in the Code, shall apply to and include all interurban railways, so that an interurban railway failing to give the signals required by section 2072 is guilty of negligence per se.

Railroads—Operation—Injury to Animal—Question for Jury.—In an action for the loss of a horse struck by a car on an electric interurban railway, evidence held to present for the jury whether the motorman could, in the exercise of reasonable care, have seen the animal in time to have stopped the car before reaching him.

Railroads—Injuries to Animals—Pleading and Proof.—Allegations in the petition of disregard of duty by the defendant by its agents and servants, in so carelessly and negligently running and managing an electric motor and cars as to cause injury to plaintiff's horse, are sufficient to authorize the admission of evidence as to whether

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the cars were properly equipped or adjusted with air brakes, and as to the condition of the electric controller.

Appeal and Error—Review—Harmless Error—Instruction—Applicability to Case.—The giving of an instruction which had no possible application to any feature of the case, though improper, was without prejudice, and constituted no ground for reversal.

Railroads—Operation—Injury to Animal—Care Required.*—Where a motorman on an interurban electric car sees, or in the exercise of reasonable care could see, a horse on a crossing ahead of the car, it is his duty to give warning signals by blowing the air whistle or ringing the gong, since such signals would be calculated, even in the case of a dumb animal, to cause it to get off the track and avoid injury.

McClain and Evans, JJ., dissenting in part.

Appeal from District Court, Dallas County; James D. Gamble, Judge.

Action to recover damages for the loss of plaintiff's horse as the result of an accident at a highway crossing in which an electric car with two freight cars and a caboose attached thereto came into contact with said horse through the alleged negligence of defendant's motorman in charge of the electric car in failing to sound the whistle and ring the bell on said car, as required by law, on approaching said crossing, and his failure to give any other signal or warning of the approach of the car to the crossing, and also his failing to stop said electric car before it struck and killed the said horse. There was a trial to a jury, and a verdict for plaintiff for the value of the horse. From judgment on this verdict the defendant appeals. Affirmed.

Guernsey, Parker & Miller, White & Clarke, and Arthur G. Rippey, for appellant.

J. E. Kelley, for appellee.

McCLAIN, J. During the nighttime plaintiff's horse escaped from his premises and went along the highway to a point where it is crossed by the track of the defendant's electric road. There it was struck and killed by defendant's car. Evidence tends to show that, although the car was provided with an air whistle and a gong or bell, the whistle was not sounded nor the gong rung on approaching the crossing, even after the motorman observed the horse on such crossing. There was also evidence tending to show that the car was not stopped until it had passed three or four hundred feet beyond the crossing, although the motorman attempted to stop it as soon as he discovered the horse

*See first foot-note of *White v. New York, etc., R. Co. (Mass.)*, 31 R. R. R. 488, 54 Am. & Eng. R. Cas., N. S., 488.

See last paragraph of foot-note of *Harris v. Missouri, etc., Ry. Co. (Okla.)*, 35 R. R. R. 1, 58 Am. & Eng. R. Cas., N. S., 1.

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which he did when the car was about 75 feet from such crossing. There was further evidence tending to show that the car was equipped with a controller, consisting of a knob, on which it was the duty of the motorman to press constantly with his hand in order that the electric power should be communicated to the propelling machinery of the car; and that, as was not unusual after such cars had been in use for some time, this controller remained pressed down without the pressure of the motorman's hand, which, at the time of approaching the highway crossing, was resting upon the windowpane, and not on the knob; and, further, that if the controller had been in the condition in which it was intended to be when in operation the motorman, by removing his hand, could have stopped the car more quickly than he did by means of the lever regulating the application of the power.

1. The trial judge held that Code, § 2072, requiring a bell and steam whistle to be placed on each locomotive engine operated on any railway, and the whistle to be sounded 60 rods before a highway crossing is reached, and the bell to be rung from that time continuously until the crossing is passed, is made applicable to electric interurbans by section 2 of chapter 81, Acts 29th Gen. Assem. (Code Supp. § 2033b), which provides that the word "railway," as used in the Code, shall apply to and include all interurban railways, and instructed the jury that, if they found by a preponderance of the evidence that the defendant company failed to give the required signals by sounding the whistle and ringing the bell, and that, if said signals had been given as required by law, the accident complained of would not have happened, then the defendant was liable for resulting damage, and the verdict should be for the plaintiff.

The provisions of Code, § 2072, material for present purposes are as follows: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle, the bell shall be rung continuously until the crossing is passed: * * * and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. Any officer or employee of any railway company violating any of the provisions of this section shall be punished by fine not exceeding one hundred dollars for each offense."

The statute relied upon as making these provisions applicable to interurban railway companies (29th Gen. Assem. c. 81, § 2: Code Supp. § 2033b) is as follows: "The words railway, railway company, railway corporation, railroad company, and railroad corporation, as used in the Code and acts of General Assembly, now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways, and all

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companies or corporations constructing, owning or operating such interurban street railways and all provisions of the Code and acts of the General Assembly, now in force or hereafter enacted, affecting railways, railway companies, and railway corporations, railroads, railroad companies, and railroad corporations, are hereby declared to affect and apply in full force and effect to all interurban railways, and to all interurban railway companies or railway corporations constructing, owning or operating such interurban railways."

The provisions found in the section of the Code, as above quoted, became a part of the law of this state in 1884 (20th Gen. Assem. c. 104), when there were no interurban railroads in the state operated by electric power. The provisions of the chapter of the Code to which it was added have since been held not applicable to interurban electric roads. *Fidelity Loan & Trust Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039; *Cedar Rapids, etc., R. Co. v. Cedar Rapids*, 106 Iowa, 476, 76 N. W. 728; *McLeod v. Chicago & N. W. R. Co.*, 125 Iowa 270, 101 N. W. 77. The reason for these decisions need not be set out, for it is not contended that Code, § 2072, would apply to defendant, unless the subsequent statute makes it applicable.

The majority of the members of court reach the conclusion that the statute above quoted, relating to interurban railways, renders applicable to them the provisions of Code, § 2072, and that the words "locomotive engine" should now be interpreted to mean, in the case of interurban railways, operated by electric power, the motor car of such railway, and that such motor car should be provided with such a whistle as is now in common use on electric motor cars—that is, an air whistle or something equivalent in character—and that the gong with which electric cars are now usually equipped is an equivalent of the bell with which the statute requires locomotive engines to be equipped, and that on approaching a highway crossing the whistle of the motor car should be sounded at least 60 rods before the crossing is reached, and thereafter the gong, or equivalent appliance, should be rung continuously until the crossing is passed. This court holds, therefore, that the trial court did not err in giving the instruction already referred to in this division of the opinion.

The writer (Mr. Justice EVANS concurring) dissents from this construction of the statute. They think that the provision as to interurban railways above quoted would be given full force and effect if, in the operation of steam locomotive engines on their track, they were required to provide such engines with whistles and bells, and sound them as the statute requires. It is to be noticed that the statute relating to interurban railways is not limited to, and does not by any language therein used specifically refer to, interurban railways on which electric motor cars are used. When the interurban statute was passed in

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1902, there were, without doubt, in the state interurban lines upon which steam locomotive engines were, at least to some extent, employed in furnishing locomotive power, and it seems to the dissenting judges that the statute can be given full effect if it is held to require that, when a steam locomotive is used on an interurban railway, it shall be equipped and operated as provided in Code, § 2072. While the term "locomotive engine" might very well be applied to an electric motor car, it is evident that in the statute these words are used to mean a steam locomotive engine, for at the time the statute was enacted no other form of motive power was in use in the railway business; and the requirement that a locomotive engine shall be equipped with a steam whistle seems clearly to indicate that the Legislature had in mind only a steam locomotive engine. If it had been intended in the enactment of the later statute to require that electric motor cars should be equipped with air whistles, and that such whistles should be sounded at least 60 rods before reaching a road crossing, then some provision of that kind would have been made.

As a reason why the language of Code, § 2072, should not be twisted into an application which does not appear to have been clearly intended by the subsequent statute, the dissenting judges beg also to suggest that the original statute is penal, and should therefore be extended under the subsequent statute only so far as the plain language employed by the Legislature requires. If section 2072 can be applied under the subsequent statute to some interurban railways, to wit, those employing steam locomotive engines of some sort, without extending it, by perversion of its language, to interurban railways employing electric motor cars, then the extension should be strictly limited to such application as the subsequent statute plainly and not obscurely or inferentially authorizes. The rule that penal statutes are to be strictly construed is too well established to need a citation of authorities in its support.

The dissenting judges would be quite willing to agree that, in view of the ordinary method of operating electric motor cars on interurban railways, the whistle should be sounded and the gong rung on approaching a railway crossing, and that a failure to give such signals might, under proper instructions, be found by the jury to constitute negligence; but they are not willing to agree that under the statute such failure constitutes negligence *per se*.

2. It is contended that the court erred in submitting to the jury the question whether there was negligence of defendant's motorman in failing to stop his car before it struck the animal. This was one of the allegations of negligence in the petition, and, unless it was entirely without support in the evidence, it was not error to state it in presenting the issues to the jury. It seems to us that the testimony of the motorman as to what

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he did was not conclusive with reference to his care. He admits that he could not stop the car, after he saw the horse, before he reached the crossing, and it would seem self-evident that, if it was possible to see the animal on the crossing at sufficient distance to stop the car before striking it, the motorman should have observed it at that distance and taken proper steps to avoid the accident. Whether the motorman could, in the exercise of reasonable care, have seen the animal in time to have stopped his car before reaching it was necessarily a question for the jury's consideration.

3. Errors are assigned as to the action of the court in overruling objections to questions by which plaintiff's counsel sought to elicit the fact that the cars were not properly equipped or adjusted as to air brakes, and the electric controller was not in proper condition. The ground of objection is that defects in the car and equipment were not alleged in the petition as constituting negligence. It appears, however, that the plaintiff alleged disregard of duty on the part of the defendant, by its agents and servants, in so carelessly and negligently running and managing the electric motor and cars that the injury complained of was occasioned. It seems to us that this allegation, although not very specific, was sufficient, in the absence of a motion for more specific statement, and that it covered the defect in the equipment of the motor and cars. The questions objected to were therefore not improper.

4. The court gave several general instructions of a stereotyped form, one of which had no possible application to any feature of the case. Such instruction should not have been given; but as it could not possibly have misled the jurors in the determination of any questions submitted to them, the error was plainly without prejudice, and constitutes no ground for reversal.

5. An instruction is criticised in which the jury was told that, if the motorman observed any animal upon the track, it was his duty to use any and all signals at hand to frighten the said animal from the track or crossing, if there was time to give such signals after such animal was seen, or should, in the exercise of ordinary care, have been seen. This was, perhaps, an inapt statement of the rule requiring the exercise of reasonable care in giving such signals as would be likely to frighten the animal from the track and prevent injury to it. There can be no question, however, as to the duty of the motorman if he saw, or in the exercise of reasonable care could have seen, the horse on the crossing, to give warning signals by way of blowing the air whistle or ringing the gong of the car, for such signals would be calculated, even in the case of a dumb animal, to cause it to get off the track and thus avoid the danger of injury. Gray-

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bill v. Chicago, M. & St. P. R. Co., 112 Iowa 738, 84 N. W. 946;
McGill v. Minn. & St. L. R. Co., 113 Iowa 358, 85 N. W. 620.

In the opinion of the majority of the court there was no prejudicial error, and the judgment is affirmed.

Affirmed.

McCLAIN and EVANS, JJ., dissent from the views of the majority stated in division 1 of the opinion.

ASPLUND *v.* GREAT NORTHERN RY. CO.

(Supreme Court of Washington, April 17, 1911.)

[114 Pac. Rep. 1043.]

Railroads—Fires—Jury Questions—Cause.—Whether a fire which burned cordwood was negligently set by defendant's locomotive held under the evidence a jury question.

Railroads—Fires—Evidence.*—To show that defendant's locomotive set the fire sued for, plaintiff could show that other fires were set by other engines, though the particular locomotive was identified.

Appeal and Error—Record—Sufficiency.—Instructions not set out in the record are not reviewable.

Department 1. Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Action by K. J. H. Asplund against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. V. Brown and Frederic G. Dorety, for appellant.

McBurney & Cummings, H. McC. Billingsley, and C. C. Cutler, for respondent.

FULLERTON, J. The respondent, plaintiff below, brought this action against the appellant to recover the value of certain wood destroyed by fire on May 7, 1909, alleged to have escaped from one of the appellant's engines because of its defective condition and the careless and negligent manner in which it was operated. There was a recovery in the court below, and the railroad company has appealed.

The evidence of the respondent tended to show that the wood burned consisted of some 396 cords, which was piled in a compact pile about 135 feet distant from appellant's railway tracks. The country surrounding the woodpile was comparatively level, with a slight upgrade towards the north. The roadbed of the

*See foot-note of *McGill Bros. v. Seaboard A. L. Ry.* (S. C.). 38 R. R. R. 695, 61 Am. & Eng. R. Cas., N. S., 695.

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appellant was somewhat elevated at this place; its height above the natural level of the surrounding country being variously estimated by the witnesses to be from seven to fourteen feet. The fire occurred in the early morning of the day. It was first seen by the engineer of one of the appellant's trains which passed the place at about 4:24 o'clock on the morning of May 7th. At about 5 o'clock, it was discovered by two of the respondent's neighbors who testify that at that time a considerable part of the pile had been consumed. The owner discovered the fire between 7 and 8 o'clock in the morning, at which time the wood was practically all burned. It was testified by persons living in the vicinity of the place of the fire that no fire was discernible in the neighborhood of the woodpile as late as 10 o'clock p. m. of the day before the fire, and the engineer of one of the trains of the appellant which passed the place at about 3:15 o'clock on the morning of the fire testified that he saw no fire or anything unusual in the neighborhood at that hour. It was also testified that sparks of sufficient size to cause a fire frequently escaped from the appellant's engines, and were thrown for considerable distances from its tracks; but that a few months before the fire occurred in the respondent's woodpile fire escaping from a freight engine operated by the appellant had burned a haystack of a neighbor of the respondent, the stack being 183 feet distant from the track; that about five days prior to the fire another woodpile of the respondent had been burned by fire escaping from one of the appellant's engines, and several witnesses testified to the fact that during the dry season of the year it was a common occurrence for appellant's engines to start fires in the inflammable debris lying on and alongside of its right of way.

[1] The foregoing is an epitome of substantially all of the evidence tending to show the cause and origin of the fire. It is the appellant's contention that it fails to make a case for the jury for two reasons: First, it does not show that the fire which burned the wood escaped from any of the appellant's engines; and, second, that, if by any inference it can be said that it could have escaped therefrom, it fails to show that the escape was because of any negligent act or omission on its part. But, without following the somewhat extended argument of the appellant in detail, we are convinced that there was here sufficient evidence of the appellant's liability to require the submission of the question to the jury. The evidence showed that fire did repeatedly escape from the appellant's engines, and, by the elimination of other sources from which the fire could have originated, it was made a reasonable inference that some one of the appellant's engines was the source of the fire. The fact, also, that fires repeatedly occurred from the engines, tended to show negligence either in their construction or operation. True,

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the appellant sought to overcome these proofs by showing that its engines were in good condition and were properly operated, particularly the engine passing at 3:15 in the morning which presumably caused the fire, but this was only the rebuttal of evidence by evidence, which made a question for the jury and not one for the court.

[2] It is contended that evidence of fires set by other engines was inadmissible, since it was shown that a particular engine caused the fire in question. But such is not the rule, nor was it so held in *Noland v. Great Northern Ry. Co.*, 31 Wash. 430, 71 Pac. 1098, cited and relied upon. In that case it was said by way of illustration that evidence of other fires by other trains at other times than the one in question was not admissible where a specific engine was designated in the complaint as having caused the fire; but it was held proper to show the fact that the defendant's engines were in the habit of emitting sparks in the absence of such an allegation. The case is authority for the rule followed by the trial court, therefore, rather than against it.

[3] Objection is made to the instructions of the court, but the instructions as given by the court are not set out in the record, and we cannot for that reason review the questions argued. The judgment is affirmed.

DUNBAR, C. J., and PARKER and MOUNT, JJ., concur.

ABBOTT v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, March 16, 1911.)

[130 N. W. Rep. 438.]

Railroads—Fire—Actions—Admissibility of Evidence.*—In an action against a railway company for negligently causing or permitting fire to escape from its locomotives, evidence to the effect that the coal used therein burned slowly and retained fire for a considerable length of time is relevant and material.

Railroads—Fire—Actions—Admissibility of Evidence.*—In an action of that character, where the particular engine which caused the fire cannot be fully identified, evidence that about the time of the injury sparks and burning coals were frequently discharged from the defendant's engines while they were passing the plaintiff's property upon previous occasions, is relevant and competent as tending to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but if the engine which emitted the fire is fully identified, evidence as to the condition or conduct of other engines is irrelevant and immaterial.

Railroads—Fire—Actions—Admissibility of Evidence.*—In the trial

*See foot-note of *McGill Bros. v. Seaboard A. L. Ry.* (S. C.), 38 R. R. R. 695, 61 Am. & Eng. R. Cas., N. S., 695.

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of a case involving the alleged negligent setting out a fire by a railway company, if the charge is general and no attempt is made to compel the pleader to state the particular engine responsible for the fire, and no request is made to require the plaintiff to marshal his evidence so as to develop whether he depends upon proof that a particular engine or an engine which he cannot identify emitted the fire, the court may permit evidence to be received to show that about the time of the injury the defendant's engines, while passing near the plaintiff's property, frequently emitted sparks and coals of fire which lodged on or about said buildings, or so far distant from the railway track as that property was situated therefrom.

Trial—Reception of Evidence—Objections.—In that event, an objection that no proper foundation has been laid for the introduction of the evidence is not sufficient to challenge the trial court's attention to the contention that the plaintiff has not introduced evidence tending to show that an unknown engine caused the fire.

Railroads—Fire—Actions—Admissibility of Evidence.†—"In an action for damages for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence." *Kearney County v. Chicago, B. & Q. R. Co.*, 76 Neb. 861, 108 N. W. 131.

(Syllabus by the Court.)

Appeal from District Court, Custer County; Hostetler, Judge.

Action by George W. Abbott against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. E. Kelby, H. F. Rose, and Frank E. Bishop, for appellant.
C. H. Holcomb and S. A. Holcomb, for appellee.

ROOT, J. This is an action to recover damages for the loss of a barn and several outbuildings destroyed by fire, which the plaintiff alleges was negligently kindled by the defendant. The plaintiff prevailed, and the defendant appeals.

There was no error in permitting the plaintiff to prove that Sheridan coal burns slowly and retains fire longer than bituminous coal. The testimony is undisputed that Sheridan coal is a lignite, and is used by the defendant in its locomotives on the division of the railway which includes the station of Broken Bow, where the plaintiff's property was located. These facts, while collateral, tend in some degree to sustain the plaintiff's contention that sparks emitted from the defendant's engine will retain the fire while traversing a space equal to that intervening between the railway and the plaintiff's barn. *Blomgren v. Anderson*, 48 Neb. 240, 67 N. W. 186; *Farmers' State Bank v.*

†See foot-note of *Jensen v. South Dakota Cent. Ry. Co.* (S. Dak.), 38 R. R. R. 155, 61 Am. & Eng. R. Cas., N. S., 155; second head-note of *St. Louis, etc., R. Co. v. Shannon* (Okla.), 36 R. R. R. 74, 59 Am. & Eng. R. Cas., N. S., 74.

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Yenney, 73 Neb. 338, 102 N. W. 617; Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50; Young *v.* Kinney, 85 Neb. 131, 122 N. W. 679.

The assignments based upon the admission of testimony to the effect that about the time of the fire, and for some months prior thereto, the defendant's engines cast out sparks in the neighborhood of the plaintiff's barn, which were carried a distance equal to or greater than that intervening between said premises and the defendant's main track, present a more serious question. The rule stated in 2 Shearman & Redfield, Negligence (5th Ed.) § 675, appeals to us as reasonable: "And when the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before or after, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same cause." If, however, the engine which emitted the fire is fully identified, then evidence as to the condition of other engines, or that fire escaped therefrom, is irrelevant. In this case the pleader did not charge that any particular engine caused the fire, and no attempt was made by motion to compel him to make the petition more certain. Upon the trial the greater part of this evidence was received before the trial court was informed whether or not the fire was caused by a particular engine. Subsequently it appeared that, if one of the defendant's engines were responsible, it probably was a locomotive attached to an east-bound passenger train, No. 42, or an engine attached to a west-bound freight which left the station immediately after the passenger train departed eastward. No motion was made to compel the plaintiff to marshal his evidence so as to first introduce testimony tending to prove whether a known or an unknown engine caused the fire, nor was any motion made to strike out the testimony after it became apparent that the freight engine was probably responsible for the conflagration. The defendant objected to this evidence for the alleged reason that a sufficient foundation had not been laid; but it does not appear that the objection was predicated upon the plaintiff's failure to testify that he did not know and could not prove that a particular engine set out the fire. For all the trial court was advised, counsel was assuming that the witness had not shown himself qualified to testify to the fact that the defendant's engines usually emitted sparks. Upon this theory the objection was properly overruled. We do not think that the trial court erred in receiving the evidence.

Since the verdict is for the plaintiff, we should consider the evidence in the light most favorable to him. The plaintiff's barn was south of the defendant's right of way, which extends east and west, and was 135 feet from the nearest track and about 200

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feet from the main track. The fire was discovered about 2 o'clock p. m. About 1 o'clock Mrs. Abbott went to the barn to search for eggs, and she says no other person was in the building, nor was there any fire therein at that time, and no one had occasion to go there until after the fire; at 1:45 p. m. the defendant's freight train departed from the station; for some time prior thereto the engine had been used in the yards for local work, which would permit it to come within 135 feet of the barn, and a strong wind was blowing from the west and northwest. There were no doors or windows on the northern side of the barn, but the shingles were warped and loosened by the heat and prevailing drought, so that openings between them would easily admit sparks and cinders; the fire evidently was kindled in the haymow on the north side of the barn. All of these facts, considered in connection with the quality of coal consumed in the defendant's engines, and the further fact that there is no other reasonable explanation for the fire, tend to prove the plaintiff's contention. The defendant did not produce any member of either train crew, and we have no proof that the engines were carefully and prudently managed and controlled. There is therefore sufficient evidence to sustain the verdict. *Burlington & M. R. R. Co. v. Westover*, 4 Neb. 268; *Union P. R. Co. v. Keller*, 36 Neb. 189, 54 N. W. 420; *Rogers v. Kansas City & O. R. Co.*, 52 Neb. 86, 71 N. W. 977; *Kearney County v. Chicago, B. & Q. R. Co.*, 76 Neb. 861, 108 N. W. 131. The defendant's contention that the fire originated from another source was submitted to the jury, and their verdict is sustained by the evidence on this issue. The instructions are fair, the recovery is not excessive, and we find no error prejudicial to the defendant.

The judgment of the district court therefore is affirmed.

LETTON, J., not sitting.

CENTRAL KENTUCKY TRACTION CO. *v.* GLASS' ADM'R.

(Court of Appeals of Kentucky, June 14, 1911.)

[137 S. W. Rep. 1054.]

Appeal and Error—Exclusion of Evidence—Prejudice.—Where, in action for death of a traveler at a private railroad crossing, the court submitted only defendant's negligence in omitting to give customary signals as the car approached the crossing, defendant was not prejudiced by the exclusion of evidence relating to other issues.

Railroads—Private Crossings—Signals.*—In an action for the death of a traveler by being struck by an electric car, an instruction requiring reasonable as distinguished from customary signals to be given of the car's approach was not erroneous under the rule that while cars may be run over private crossings at any speed on the giving of customary signals, it was also incumbent on defendant to give reasonable signals if it had been customary for the cars to give signals at all, and such custom had prevailed so that persons using the crossing had reason to rely on such signals.

Railroads—Operating Cars—Warning.—A person of ordinary prudence, operating an electric car, may usually be expected to give such warning of its approach as will apprise persons exercising ordinary care for their own safety and in possession of their ordinary faculties of its approach.

Appeal and Error—Refusal of Instructions—Prejudice.—Where the jury had before them all the facts, and found that intestate, as she approached a crossing where she was killed in a collision with an electric car, exercised such care as might reasonably be expected of a person of ordinary prudence, defendant was not prejudiced by the refusal of an instruction that as the crossing was especially dangerous, it was her duty to exercise increased care commensurate with the danger.

Appeal and Error—Instructions—Refusal—Prejudice.—Where, in an action for death at a street crossing of an electric road, the court withdrew from the jury all evidence as to the speed of the car, and submitted the case only on defendant's negligence in failing to give reasonable signals, defendant was not prejudiced by the refusal of an instruction that it was entitled to run its cars over the crossing at any rate of speed.

Appeal from Circuit Court, Woodford County.

Action by May Glass' administrator against the Central Ken-

*For the authorities in this series on the duty to give train signals for private crossings, see first foot-note of *Louisville, etc., R. Co. v. Engleman* (Ky.), 35 R. R. R. 106, 58 Am. & Eng. R. Cas., N. S., 106; first foot-note of *Hartman v. Chicago G. Ry. Co.* (Iowa), 26 R. R. R. 791, 49 Am. & Eng. R. Cas., N. S., 791; first head-note of *Hoback v. Louisville, etc., Ry. Co.* (Ky.), 26 R. R. R. 8, 49 Am. & Eng. R. Cas., N. S., 8.

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tucky Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wallace & Harriss and Stoll & Bush, for appellant.
D. T. Edwards, for appellee.

HOBSON, C. J. May Glass, a young lady 19 years of age, lived with her parents at their home on the Versailles and Frankfort turnpike about two miles west of Versailles, the house being about a quarter of a mile from the turnpike. A private road ran from the house down to the pike, and crossed near the pike the track of the Central Kentucky Traction Company which runs parallel with the pike and close to it. As the traction line comes up to the crossing it passes through a cut deep enough to prevent a person driving along on the road from seeing a car approaching on the traction line, and the person so driving along would not be visible to those operating the car until the horse got very near the line of the railroad. On the morning of December 7, 1909, about 8 o'clock May Glass got in a buggy and started to Versailles. As she reached the line of the traction company a car running west about 35 miles an hour collided with the buggy, killing her instantly. The horse had passed over the track; the car struck between the two wheels of the buggy. The horse was not injured, but the buggy was demolished. It was a private crossing, but it was customary for the cars to give notice of their approach to the crossing. This action was brought by the personal representative of the young lady to recover damages for her death on the ground that it was due to the negligence of those operating the car. The defendant traversed the allegations of the petition and pleaded contributory negligence on the part of the deceased. The proof for the plaintiff was that no notice of the approach of the car to the crossing was given. The proof for the defendant was that notice was given. The proof for the plaintiff was that the car was a little late, while that for the defendant was that the car was on time. It was undisputed in the evidence that it was customary for the cars to give signals of their approach to the crossing. On this evidence the court instructed the jury in substance as follows: (1) If it had been customary for the cars to give signals of their approach to the crossing, and the custom had prevailed to such an extent that persons using the crossing had reason to rely on such signals being given, and the car in question failed to give reasonable signals of its approach to the crossing, and by reason of such failure the intestate was killed, they should find for the plaintiff. (2) Reasonable signals are such as give such notice of the approach of the car to the crossing as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. (3) It was the duty of the deceased in approaching the crossing to use such

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care as may be usually expected of an ordinarily prudent person to learn of the approach of the car and keep out of its way, and if the deceased failed to exercise such care, and but for this would not have been injured they should find for the defendant, though there was negligence on the part of the defendant as set out in No. 1. (4) Unless it had been customary for the cars to give signals of their approach to the crossing and the custom had prevailed to such an extent that persons using the crossing had reason to rely on the signals being given, and the car in question failed to give reasonable signals of its approach to the crossing and by reason of such failure the deceased was killed, they should find for the defendant. The jury found for the plaintiff, fixing the damages at \$4,000. The court entered judgment on the verdict refusing a new trial, and the defendant appeals.

[1] It will be observed that the case was submitted to the jury upon only two questions: First, whether the car failed to give reasonable signals of its approach to the crossing and by reason of such failure the deceased was killed; second, whether she failed to use such care as may be expected of an ordinarily prudent person to learn of the approach of the car and keep out of its way, and but for this would not have been injured. While the proof on the trial took a wider range, it will be seen that the court by its instructions confined the case to these two questions. The plaintiff could only recover upon the single ground that reasonable signals of the approach of the car were not given, and although the signals were not given, still she could not recover if she failed to use ordinary care for her own safety. It is insisted for the plaintiff that the court erred in the admission of evidence, but all the matters complained of related to things that were excluded from the consideration of the jury by the instructions of the court. It is complained that the motorman was not allowed to state that the air brake was applied by him as soon as the danger was discovered and that it remained applied until after the accident. But the jury were not permitted to find against the defendant for this, and so the rejection of the evidence could have had no effect on the result. A witness was introduced by the plaintiff as an expert to testify as to the distance in which a car could be stopped. He said it could be stopped in a certain distance if the rail was dry, but that this did not apply if the rail was wet; that then the wheel would slip on the rail, and it could not be stated definitely how far the car would go. This evidence was objected to on the ground that the proof all showed that the rails were wet and the car going downgrade. But the court took the whole matter from the jury when he limited them to the question whether proper signals of the approach of the car were given. Some evidence was introduced as to whether the motorman could see the horse

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approaching the track, and it is complained that the motorman was not allowed to testify on this subject, that he was looking down the track and not to the side; but this question was also taken from the jury by the instructions of the court. The defendant offered in evidence its train sheet as kept by its train dispatcher, and complains that certain statements of the train dispatcher were not admitted. We have carefully gone over the evidence, and we conclude that there was no substantial error in this matter; that the defendant got before the jury in substance all that the train dispatcher knew, and if what was excluded had been admitted it could have had no effect upon the finding of the jury under the instructions. The train sheet was given in evidence.

[2] It is insisted that the first instruction is wrong in that it required that reasonable signals should be given, and it is said that only the customary signals should have been required. It is true that cars may be run over private crossings at any speed and that notice of their approach to such crossings is not required unless it has been customary to give such signals, and persons using the crossing are accustomed to rely on them. But when signals are given they should be given reasonably. A signal that is not reasonable would be useless. A signal could serve no good purpose unless it was given in time to warn the person approaching the crossing of his danger. The court therefore properly held that it was incumbent on the defendant to give reasonable signals of the approach of its cars to the crossing, if it had been customary for the defendant's cars to give signals of their approach to the crossing and this custom had prevailed to such an extent that persons using the crossing had reason to rely on the signals being given.

In *L. & N. R. R. Co. v. Engleman*, 135 Ky. 515, 122 S. W. 833, which was a case like this, we held that a signal was reasonable which was ordinarily sufficient to give notice of the coming of the car to persons who were themselves exercising ordinary care for their safety, and in possession of their ordinary faculties.

[3] It is insisted that the second instruction of the court is in conflict with the rule there laid down; but a person of ordinary prudence operating a car may usually be expected to give such warning of its approach as would apprise of its coming persons exercising ordinary care for their own safety and in possession of their ordinary faculties. Under the facts of this case the difference between the two instructions is not material; for here it was maintained on one side that no signal was given, and on the other side that the signal was given. It was simply a question here under the evidence whether any signal of the car's approach was given.

[4] It is also insisted that the third instruction is erroneous

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for the reason that if the crossing was especially dangerous it was the duty of the intestate to exercise increased care commensurate with the danger. *Southern R. Co. v. Winchester*, 127 Ky. 154, 105 S. W. 167, 32 Ky. Law Rep. 19. If this instruction had been given we are satisfied from all the proof it would have had no effect on the verdict. The jury had before them all the facts, and they found that the intestate exercised such care as may be reasonably expected of a person of ordinary prudence situated as she was.

[5] The defendant also complains that the court refused an instruction asked by it to the effect that it had the right to run its cars over the crossing at any rate of speed it saw fit. But this instruction would not have elucidated any matters submitted to the jury; in fact, all the evidence as to the speed of the train was withdrawn from the consideration of the jury, by the instruction which required the jury to find for the defendant if reasonable signals of the approach of the car were given.

On the question of fact whether the signals were given and whether the deceased used ordinary care, we are unwilling to disturb the verdict of the jury on the ground that it is so against the evidence as to indicate passion or prejudice; and on the whole case we find no substantial error in the record to the prejudice of the defendant.

Judgment affirmed.

MICHAELS v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Wisconsin, June 1, 1911.)

[131 N. W. Rep. 892.]

Railroads—Private Crossing—Signals—Common-Law Duty.*—A private crossing at which decedent was killed was constructed some 20 years before the injury, and had been afterwards maintained by defendant. It was peculiarly dangerous because of a curve, making it difficult both to see and hear an approaching train. At the speed the train was running which struck deceased, it would reach the crossing in about 10 seconds from the time it could be seen by a person standing thereon. Held, that defendant owed a common-law duty to signal the approach of a train to such crossing.

Railroads—Crossing Accident—Death of Traveler—Contributory Negligence.†—Decedent, with his two sons, started over a private railroad crossing with a team. The crossing was dangerous, and a train approaching it from the north could be seen by a person on

*See foot-note of preceding case.

†See foot-note of *Dixon v. New York, etc., R. Co. (Mass.)*, 38 R. R. 181, 61 Am. & Eng. R. Cas., N. S., 181.

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the right of way only for a distance of from 140 to 700 feet according to location. When they arrived at the gate, they stopped and listened for a train, and, hearing none, deceased went down to the crossing and listened, and then signaled his son to drive on. He stood on the crossing and listened until the son was about 60 feet away, when he started to open the opposite gate, still looking in the direction in which the train came. The son drove the horses on the crossing, and deceased was about 10 or 12 feet therefrom when the younger son gave warning that a train was coming, and deceased instantly started back, grabbed the team, and pushed and backed them and the wagon up a bank and off the crossing. When the train was 75 or 100 feet away, the son who had been driving jumped from the wagon, and, as the locomotive passed, the horses reared and swung round, and the engine struck deceased, killing him. There was evidence that the train struck deceased at or about the time his son jumped from the wagon. Held, to show that deceased acted not to save his property, but to save his son, and that this was sufficient justification to relieve him from negligence as a matter of law.

Railroads—Crossing Accident—Proximate Cause.—Defendant's failure to signal the approach of a train and not fright of horses was the proximate cause of decedent's death.

Marshall, J., dissenting.

Appeal from Circuit Court, Pierce County; E. W. Helms, Judge.

Action by M. A. Michaels, as administrator of the estate of William Seater, against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover for the unlawful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant. The material allegations of the complaint respecting the defendant's negligence are substantially that for many years prior to the 5th day of December, 1908, the defendant had constructed and maintained a crossing over its tracks on the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 12, township 25, range 18 W., in the town of Trenton, for the use of the public upon a private road crossing defendant's railroad track; that said crossing was and is situated upon a heavy curve in said track, and that at said crossing the view of said track to the north is obstructed by reason of said curve, and for the further reason that said track curved around on the opposite side of a hill which obstructed the view from said crossing in a northerly direction so that a person standing on said crossing could not see an object or an approaching train on defendant's track for a greater distance than two hundred feet north of said crossing; that said crossing had been in constant and reg-

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ular use by the public and the owners of the adjoining land for more than 10 years prior to said 5th day of December, 1908, and that, owing to the physical surrounding and the obstructions presented to the vision, said crossing was dangerous, as defendant well knew; that it was the duty of said defendant in running and operating its trains when approaching said crossing from the north to ring the bell and blow the whistle, and give signals of the approach of said trains; that on said 5th day of December, 1908, and for many years prior thereto, a public highway in said town of Trenton crossed the railroad track of the defendant about three-fourths of a mile north of said private crossing, and it was the duty of said defendant when its trains approached said public crossing to blow the whistle 80 rods therefrom and ring the engine bell continuously from said whistling point until said public crossing was reached and crossed; that for many years prior to said 5th day of December, 1908, it had been the habit and custom of said defendant when approaching the private crossing to sound the whistle 80 rods from said crossing and to ring the bell continuously therefrom until said crossing was reached and passed; that, when said defendant sounded its whistle for the public crossing three-fourths of a mile north of said private crossing, said whistle could easily be heard by any person in the vicinity of the private crossing; that on or about the 5th day of December, 1908, said deceased approached the said private crossing with intent to cross the same with a team of horses hitched to a lumber wagon, accompanied by his two sons, with due care, caution, and prudence, relying upon the aforesaid custom and duty of said defendant to signal as aforesaid the approach of its trains to said crossing; that while said deceased, with said team, accompanied by his two sons, was crossing said track, said defendant negligently and carelessly, at a high and dangerous rate of speed without any signal or warning of its approach, ran an engine attached to a passenger train, coming from the north, over said crossing, and struck and killed said deceased without fault or negligence on his part; that in approaching said crossing said defendant failed to sound the whistle at either of the crossings above described, and negligently failed and omitted to ring the bell while approaching either of said crossings; and that the failure of the said defendant to give said signals was the proximate cause of the death of said William Seater.

The material allegations of the complaint were put in issue by the answer. At the close of the evidence motion by defendant for directed verdict was denied. The jury returned the following verdict:

"(1) Was the whistle of the engine on train 52 sounded for the Red Wing crossing on the morning of December 5, 1908? Answer. No.

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"(2) Was the whistle of the engine on train 52 sounded on the morning of December 5, 1908, after the train left Red Wing crossing, and as the same approached the Seater private crossing? Answer. No.

"(3) If you answer question No. 1 'No,' then answer this: Would William Seater have been struck by the engine and injured if the whistle had been sounded for the Red Wing crossing? Answer. No.

"(4) If you answer question No. 1 'No,' then answer this: Would a person of ordinary judgment and experience in the business of defendant, in the light of the circumstances existing when the train approached the Red Wing crossing, ordinarily have anticipated that some injury might probably result to some person using the Seater private crossing by reason of not sounding the whistle for the Red Wing crossing? Answer. Yes.

"(5) If you answer question No. 2 'No,' then answer this: Would William Seater have been struck by the engine and injured as he was if the whistle had been sounded south of the Red Wing crossing and at a point north of the Seater crossing a reasonable distance from the same? Answer. No.

"(6) If you answer question No. 2 'No,' then answer this: Was the defendant company, through its employee in charge of the engine, guilty of any want of ordinary care in not sounding the whistle after leaving the Red Wing crossing as the train approached the Seater crossing? Answer. Yes.

"(7) If you answer question No. 2 'No,' then answer this: Would a person of ordinary judgment and experience in the business of the defendant, in the light of the circumstances existing when the train approached the Seater private crossing, and before coming within sight of the same, ordinarily have anticipated that some injury might probably result to some person using the Seater crossing by reason of not sounding the whistle after leaving the Red Wing crossing, and at a point north of the Seater crossing a reasonable distance from the same? Answer. Yes.

"(8) Was William Seater guilty of a want of ordinary care for his own safety, which want of ordinary care contributed to his injury as a proximate cause thereof? Answer. No.

"(9) Would a person in the exercise of ordinary care and prudence, situated as deceased was when he started to back his team off from the railway track, have anticipated that death or serious bodily injury were likely to result to him from the danger to which he then exposed himself? Answer. No.

"(10) If the plaintiff is entitled to recover in this case, at what sum do you assess his damages? Answer. \$8,000."

The usual motions were made by the defendant for judgment notwithstanding the verdict, upon the verdict, to change answers

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to questions in the verdict, for judgment, to set the verdict aside, and for new trial, all of which were denied, and due exceptions taken. The court ordered judgment upon the verdict in favor of the plaintiff, which was rendered, and from which this appeal was taken.

Woodward & Lees (John E. Foley, of counsel), for appellant.
White & Skogmo and W. C. Owen, for respondent.

KERWIN, J. (after stating the facts as above). The questions raised by the assignments of error are (1) negligence of defendant; (2) contributory negligence of deceased; (3) improper admission of evidence; and (4) denial of motion for new trial.

The private crossing where the injury occurred was known as the Seater crossing, and the public crossing as the Red Wing crossing, and was one mile northwest of the private crossing. There is evidence tending to show that the defendant's track approaches the Seater crossing on a two-degree curve. This crossing leads from the house and barn of deceased on high land north or northeast to the track and to the low land south or southwest of the track and runs diagonally across the right of way. The lower gate of this private crossing is about 250 feet west-erly from the upper gate. At different points upon the right of way at this crossing one could see northwest on the track a distance varying with the position occupied from about 140 to 600 or 700 feet; that a whistle blown 80 rods above the public crossing could sometimes be heard at the private crossing, sometimes not; a person standing on the private crossing could at times hear the rumbling of an approaching train before it came in sight, sometimes not; this private crossing was used only by Seater and a few others, his farm lying on both sides of the railroad track; deceased did not know much about the crossing or the use of it since he had lived with his brother only a short time, having moved there from Iowa about three weeks before the injury; deceased knew trains passed very frequently, and knew one was going about the time of the injury, but did not expect it so early, or did not think it was due at the time of the injury, but still deceased was looking and listening for the train; the house in which deceased lived was on a hill about 25 rods east of the upper gate of this right of way; the private way extended down from the top of the hill to a ravine, then passed along the edge of the ravine on the side of the hill which caused the curve in the railroad track; this hill obstructed the view of the railroad track to the north; the wagon track extending down the hill to the crossing was narrow, about wide enough for a wagon, and on the upper side of the wagon track was a bank which continued down to the crossing. There is a bluff on the upper side of the track, quite steep, about 150 feet high from the track up to the top of the hill. A person

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standing on the private crossing could hear the noise of an approaching train only when it was a short distance from the crossing.

In the forenoon of December 5, 1908, deceased, with his two sons, Elmer, aged 17, and William, aged 15, left the house on the top of the hill to cross the track to get a load of wood, Elmer driving. When they arrived at the upper gate, they opened it and stopped and listened for a train, but did not hear any. Deceased went down to the crossing, looked and listened for a train, then signaled Elmer to come on. He stood on the crossing looking and listening until Elmer was about 60 feet away, then started for the lower gate, still looking north, the direction from which the train came. Elmer had his horses on the crossing, and the deceased was about 10 or 12 feet from the crossing when the younger son hollered that a train was coming; at that instant deceased started back, grabbed the team, which was then on the track, and pushed and backed them and the wagon off the crossing. At the time deceased was struck the rear wagon wheels were up against the bank. When the deceased ran back to the horses, Elmer started to pull on the lines. As quick as he grabbed the team, deceased got the team entirely off the track when the train was 75 or 100 feet away, and as he did so Elmer jumped off the wagon. As the locomotive passed the horses reared and swung around, and the locomotive struck deceased a glancing blow, throwing him about 40 feet east of where he was struck. The train was running a fraction over 70 feet a second. The blow killed the deceased, who at the time of his death was 44 years of age and in good health. He left him surviving his widow and four children.

It is strenuously argued on the part of the appellant that a verdict should have been directed for the reason that there was no proof of negligence on the part of the defendant; that failure to blow the whistle and ring the bell as the train approached the Red Wing crossing and failure to blow the whistle and ring the bell while approaching the private crossing where the accident happened was not negligence. We shall spend no time on the negligence charged respecting the failure to give any warning as the train approached the public crossing. Respecting the duty to ring the bell or sound the whistle when approaching the private crossing on the question of negligence of the defendant we will consider. No claim is made by defendant that the whistle was blown or the bell rung as the train approached the private crossing, and the question is whether the defendant under the circumstances of this case was guilty of negligence in failing to do so. No statutory duty existed to signal for the private crossing, and the question to be determined is whether the defendant was bound to do so at common law under the circumstances of this case.

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[1] The private crossing was constructed at the time the railroad was built some 20 years before the injury, and afterwards maintained by defendant. It had been used by the occupiers of the Seater farm and some others. The evidence shows that this private crossing was dangerous because of the overhanging hill, the curve, the difficulty in hearing an approaching train as well as the physical condition of the crossing. There is evidence that at the speed the train was running it would be on the crossing in about 10 seconds from the time it could be seen by a person standing on the crossing. The unwritten law, therefore, in the absence of statute, made it the duty of defendant to signal the approach of the train if in the exercise of its duty ordinary care required it to do so. *Duffy v. Chi. & N. W. R. Co.*, 32 Wis. 269; *Seefeld v. Chi., M. & St. P. R. Co.*, 70 Wis. 216; 35 N. W. 278, 5 Am. St. Rep. 168; *Kujawa v. Chi., M. & St. P. R. Co.*, 135 Wis. 562, 116 N. W. 249; *Winstanley v. Chi., M. & St. P. R. Co.*, 72 Wis. 375, 39 N. W. 856; *Eilert v. Green Bay & M. R. Co.*, 48 Wis. 606, 4 N. W. 769; *Swift v. Staten I. R. T. R. Co.*, 123 N. Y. 645, 25 N. E. 378; *Hartman v. Chi., G. W. R. Co.*, 132 Iowa 582, 110 N. W. 10; *Nichols v. Chi., M. & St. P. R. Co.*, 125 Iowa 236, 100 N. W. 1115. In the instant case the court is of opinion that whether the defendant was guilty of negligence in failing to signal the approach of the train before reaching the private crossing was a question for the jury.

[2] It is further argued by counsel for appellant that deceased was guilty of contributory negligence in putting himself in a place of danger in going upon the crossing and in failing to back his team a sufficient distance from the track, and that he failed to exercise care commensurate with the known danger. It is said that deceased in his own judgment considered he had reached a position of safety, was making no effort to push the horses further back or to step to one side, and *Walters v. Chi., M. & St. P. R. Co.*, 104 Wis. 251, 80 N. W. 451, *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360, *Eastwood v. La Crosse C. R. Co.*, 94 Wis. 163, 68 N. W. 651, and *Abbot et al. v. Kalbus*, 74 Wis. 504, 43 N. W. 367, are relied upon on this point. The cases cited do not rule the instant case in favor of appellant. In *Walters v. Chi., M. & St. P. R. Co.*, supra, there was negligence in failing to look for the train. In *Flaherty v. Harrison*, supra, the case turned on the sufficiency of the evidence to carry the case to the jury on the claim of negligent ringing of the bell which frightened the horses. *Eastwood v. La Crosse C. R. Co.*, supra, involved the question of negligence in failure to stop a car on the appearance of danger to any one near the track. In *Abbot v. Kalbus*, supra, it was ruled that there was no evidence to carry the case to the jury on the question of the operation of defendant's locomotive. The evidence in the present case is ample to support a finding that the deceased exercised ordinary

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care in endeavoring to get his team as far off the track as he could in the few seconds he had to do it. He did not voluntarily put himself or his team in a place of danger. He was required to act instantly, and without reflection or deliberation, since the train was practically upon him before he saw or heard it and going at a very high rate of speed. Moreover, there is evidence that, in view of the narrow passageway from the wagon and the high bank in the rear, he backed the horses as far as he could in his hurried effort to get them off the track. There is also ample evidence to support a finding that there was no negligence in failure to look or listen, or in the movements of the team after it entered upon the right of way. It is also urged that the deceased was guilty of negligence in pushing the team off the track in the presence of danger in order to save his property, and that it was not done to save his son who was driving the team. It is said that the deceased rushed into danger for the purpose of saving his property, and that under all the authorities, in the absence of some imperative public or private duty, the attempt to save property would not excuse his action. It is not necessary to decide, and we do not decide, whether the deceased under the circumstances would have been justified in putting himself in the position in which he did merely to save his property, because there is sufficient evidence to support the verdict that the safety of his son was the impelling motive which induced him to rush the team off the track. And there is evidence that the train struck deceased at or about the time the boy jumped from the wagon. The safety of the boy was sufficient justification for the acts of the deceased in getting the team off the track. *Mobile & O. R. Co. v. Ridley*, 114 Tenn. 727, 86 S. W. 606; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Corbin v. Philadelphia*, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825; *Cottrill's Adm'r v. Chi., M. & St. P. R. Co.*, 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553.

[3] It is argued that the proximate cause of the injury was the fright of the horses, not the failure to signal the approach of the train. We do not regard this contention tenable. *Sarles v. Chi., M. & St. P. R. Co.*, 138 Wis. 498, 120 N. W. 232, 21 L. R. A. (N. S.) 415; *Kujawa v. Chi., M. & St. P. R. Co.*, 135 Wis. 562, 116 N. W. 249. The evidence shows that the deceased used caution in going upon the crossing. He stopped at the upper gate and listened for a train, went on the crossing, looked and listened. No train was in sight or could be heard, the evidence tends to show. In so far as the answers of the jury to the questions in the special verdict are material to this case, in our view of it, they are supported by the evidence, and hence the motions to change the answers were properly denied. The evidence

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respecting signals for the Red Wing crossing was even if improperly admitted not prejudicial, and the evidence tending to show that no signal was given on approaching the Seater or private crossing was properly admitted. Nor was there error in refusal to submit to the jury the question requested respecting the duty of the deceased to constantly look up the track in the direction from which the train was coming.

The court is of opinion that the judgment below is right, and must be affirmed.

The judgment is affirmed.

MARSHALL, J., dissenting.

MORTON'S EX'R *v.* SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, June 8, 1911.)

[71 S. E. Rep. 561.]

Railroads—Precautions as to Persons at Crossing.*—It is not the duty of an engineer to stop when he sees a person approaching the track at a crossing as he has the right to assume, in the absence of anything showing the contrary, that such a person will take reasonable precaution for his own safety, and not rush in front of a rapidly moving train.

Railroads—Persons at Crossing—Last Clear Chance.†—Where there is, nothing to show that an engineer knew, or could have known, in time to have stopped his train, that one on the track at a crossing would be unable to cross before the train struck him, the doctrine of the last clear chance has no application.

Railroads—Persons at Crossing—Instructions—Sufficiency.—In an action by the executor of one killed by a railroad train at a crossing, the instructions held to be sufficient, and to have fully and fairly submitted the case upon the evidence to the jury.

Error to Circuit Court, Campbell County.

*See foot-note of *Murray v. Southern Ry. Co.* (Ky.), 38 R. R. R. 669, 61 Am. & Eng. R. Cas., N. S., 669; last head-note of *Illinois Cent. R. Co. v. Comfort* (Miss.), 38 R. R. R. 732, 61 Am. & Eng. R. Cas., N. S., 732; second foot-note of *Neary v. Northern Pac. Ry. Co.* (Mont.), 38 R. R. R. 100, 61 Am. & Eng. R. Cas., N. S., 100.

†See last foot-note of *Edge v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 737, 61 Am. & Eng. R. Cas., N. S., 737; last head-note of *Louisville, etc., R. Co. v. Trisler* (Ky.), 38 R. R. R. 650, 61 Am. & Eng. R. Cas., N. S., 650; last foot-note of *Welsh v. Tri-City Ry. Co.* (Iowa), 37 R. R. R. 398, 60 Am. & Eng. R. Cas., N. S., 398; last head-note of *Belle Alliance Co. v. Texas, etc., Ry. Co.* (La.), 37 R. R. R. 43, 60 Am. & Eng. R. Cas., N. S., 43; sixth head-note of *Farris v. Southern R. Co.* (N. C.), 36 R. R. R. 523, 59 Am. & Eng. R. Cas., N. S., 523; first foot-note of *Denver City Tramway Co. v. Wright* (Colo.), 36 R. R. R. 360, 59 Am. & Eng. R. Cas., N. S., 360.

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Action by Charles S. Morton's executor against the Southern Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The following instructions were given by the court:

"(1) The court instructs the jury that the track of a railway company is of itself a proclamation of danger to a traveler, and that he must not only use his eyes and ears, looking and listening in both directions, but he must, when about to cross a track, look and listen, so as to make these acts reasonably effective. If such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train has passed, and to go on the track under such circumstances is negligence, and he cannot recover.

"(2) The court instructs the jury that if they believe from the evidence that the engineer was guilty of negligence in failing to see Dr. Morton, or warn him of the approach of the train, or in failing to endeavor to stop or reduce the speed of the train after the engineer could by the exercise of due care have seen Dr. Morton's danger, and if they further believe from the evidence that Dr. Morton by the exercise of due care on his part would or should have discovered the negligent omission of the engineer in time to have saved himself, the jury must find for the defendant.

"(3) The court instructs the jury that Dr. Morton, the plaintiff's testator, in going upon the tracks in front of the approaching train, was guilty of negligence, and in the absence of evidence that he could not have gotten off the track sooner, his negligence continued as long as he remained on the track, and until the train collided with him. Therefore, notwithstanding the engineer, also, may have been guilty of negligence in not seeing Dr. Morton, or in not sounding the whistle, or in not endeavoring to stop or reduce the speed of the train, the jury must nevertheless find for the defendant.

"(4) The court instructs the jury that if they believe from the evidence that the decedent, Charles S. Morton, could have stepped from the track and avoided collision with the train after the train had reached a point at which no effort on the part of the engineer could have prevented the collision, then the jury must find for the defendant, even though they believe from the evidence that the engineer might, by the previous exercise of due care, have discovered, in time to have prevented the collision, the said Morton's intention to cross the track in front of the train.

"(5) The court instructs the jury that if the engineer failed to see and warn Dr. Morton, and failed to endeavor to stop or reduce the speed of the train when by the exercise of due care he could or should have done so, and that Dr. Morton failed to see the approaching train when by the exercise of due care he

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could have done so, and prevented the collision, then the jury must find for the defendant.

"(6) The court instructs the jury that if Dr. Morton's death was due to the concurring negligence of himself and the defendant's servants in charge of the train, that is, to the negligence of both parties, Dr. Morton and the company, operating and in effect at the same time, they must find for the defendant.

"(7) The court instructs the jury that the duty of Dr. Morton to look out for his own safety was as great as the duty of the defendant to look out for him, and the court instructs the jury that the negligence of the defendant, if it was negligent, did not excuse Dr. Morton from the reciprocal duties he owed to care for his own safety, and that no negligence of the defendant would entitle the plaintiff to recover, unless it was the sole, proximate cause of the death of Dr. Morton."

The following instructions were requested by plaintiff, and refused:

"(A) The court instructs the jury that, although they may believe from the evidence that the defendant's engineer sounded the crossing signal at the proper point as he approached the crossing in question, this would not relieve the defendant of the duty of exercising ordinary care in keeping a reasonable lookout as its engine approached said crossing (should the jury believe from the evidence that it was a public highway crossing) in order to avoid injuring persons traveling thereon, and such failure on its part to exercise such care in keeping such lookout would be negligence.

"(B) The court instructs the jury that the law imposes upon a railway company and its agents in charge of its locomotive engines the duty of exercising ordinary care in keeping a reasonable lookout when such engine is approaching a public highway crossing, in order to avoid injury to persons passing across its tracks at such crossing, and a failure to exercise such care constitutes negligence.

"(C) The court instructs the jury that if they believe from the evidence that the plaintiff's testator went dangerously near to or upon the defendant's north-bound track under the conditions disclosed by the evidence in the case, thereby placing himself in a position of peril from defendant's engine and train approaching along said track from the south, he was guilty of negligence in so doing, and the plaintiff cannot recover in this action, unless the jury further believe from the evidence that the point at which the plaintiff's testator was crossing said track was a public highway crossing, that, after he has so placed himself in a position of peril, the defendant's engineer in charge of said approaching engine could and would, by the exercise of ordinary care in keeping a reasonable lookout as the engine approached said crossing, have discovered plaintiff's testator's peril in time to have avoided

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striking him, and that the said engineer failed to exercise such care, and by reason of such failure ran upon and killed him, in which event the defendant would, notwithstanding the said negligence of plaintiff's testator, be liable for his death."

Lee & Kemp, for plaintiff in error.

Coleman, Easley & Coleman, for defendant in error.

CARDWELL, J. Charles S. Morton's executor brought this action against the Southern Railway Company to recover damages for the death of his testator, caused, it is alleged, by the negligence of the defendant company, and at the trial of the cause there was a verdict and judgment for the defendant company, to which judgment the plaintiff obtained this writ of error.

The deceased was killed on the 28th day of July, 1909, by a freight train at the crossing of defendant in error's track over a public highway at Lawyer's Station, in Campbell county, Va. in broad daylight, about 6 o'clock in the afternoon. While deceased was 77 years of age, according to the testimony of his son, the plaintiff in error, he had led "an extremely active life," and his general health and mind were very good—"in rather splendid condition"—at the time of the accident, though "his limbs were very feeble and he moved very slowly in his walking."

The defendant in error, at the point of this accident, maintained a double track, which crosses the public highway practically at right angles; the station at Lawyer's being on the right-hand side going north. From this highway crossing south the railway track is perfectly straight for at least a mile, so that a person at the crossing could see an approaching train, and could in turn be seen by the engineer in charge of the engine while the engine was traveling that distance. The rumbling of the train could be and was heard before it "came over the hill," more than a mile, and it was not a train scheduled to stop at that station. Deceased had bought a farm some miles from Lawyer's, and on the day of his death rode over to the farm with a man named Withers. He walked from the depot to Withers' house, a distance of three-fourths of a mile, and Withers drove him in a buggy to the farm and back to the station. Withers, testifying in this case, states that he saw nothing the matter with deceased; that his hearing was "as good as anybody's;" that his eyesight was as good "as anybody's"—"unusually good;" and that "he was all right mentally." When deceased returned to the depot, he visited a store on the side of the tracks opposite the station to secure an envelope and paper upon which to write a letter, and with the envelope and paper in his hand came on along the public highway towards the railway tracks in the direction of the station. When he reached the right of way of defendant in error, according to the statement of Marshal Payne, colored, the only eyewitness as to what took place, his figure was

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bent, his head bowed, and his eyes fixed upon the ground, coming slowly and feebly up to and across defendant in error's south-bound track, and into the space between the south-bound and the north-bound track. Payne was on the "towpath about 110 yards north of the crossing, and was going south towards the crossing; the "towpath" being on the right-hand side (going south) of all the tracks, thus putting the witness out of line with the north-bound track upon which the train was running. The witness Payne undertakes to fix the point at which he was and where the train was when he first saw deceased approaching the crossing by certain objects on the side of the railroad track, or freight cars standing on one of the tracks south of the crossing; but, as clearly appears from his statement, he did not consider deceased in any danger until the latter had actually stepped upon the north-bound track on which the train that struck him was running. To a question as to when he commenced holloing at deceased, the witness answered: "He had started across the north-bound track, just made one step, when I holloed to him to come back before the train come. I holloed to him for him not to go over there, because I saw danger coming." The witness further says: "After he (deceased) aimed to go, to make it across the north-bound track, it (the train) was right there at the side of them box cars." And according to measurements furnished by plaintiff in error, the distance the train was then from the crossing was 105 yards (315 feet) and traveling at the rate of from 30 to 35 miles an hour, and the rumbling of which was distinctly heard by plaintiff in error's witness Wheeler (66 years old) a mile off, "before it come over the hill," so that, without entering upon a calculation in figures of the time and the distance made by the train therein, the conclusion is irresistible that, had the engineer seen the deceased the instant he stepped on the north-bound track, he must have thought, and he had the right to think, that there was ample time for deceased to clear the track before the engine reached the crossing, and that, had he seen deceased approaching the track in front of the rapidly approaching train, he (the engineer) expected, as he had the right to expect, that deceased would keep off the track until the train passed. The engineer, an experienced employee, testifies that he neither saw the deceased nor knew that he had been struck and killed till the train reached the next station. He was sitting on the right-hand side of the engine, the opposite side from that which the deceased was approaching the track; and the witness Harvey, for plaintiff in error, says that, standing about midway between the north-bound and south-bound tracks at the crossing (the distance between them being 8 feet), he could see an engineer on his seat in an engine coming north from Danville until the engine got about five rails from the crossing, which would be 170 feet, but

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after getting within the 170 feet the engineer would be obscured from the witness' view, and the witness from the engineer's view, by the boiler and the smokestack of the engine.

There are but two bills of exceptions made a part of the record—the one to the giving and refusing of instructions, and the other to the ruling of the court upon the motion of plaintiff in error to set aside the verdict of the jury and grant a new trial; and these exceptions are relied on here for a reversal of the judgment of the trial court.

The contention of plaintiff in error is (1) that it was the duty of defendant in error's engineer in charge of its engine to exercise ordinary care in keeping a reasonable lookout as the engine approached the public highway crossing, in order to avoid injury to persons crossing its tracks at such crossing, and that a failure to exercise such care would constitute negligence; (2) that, although it should appear from the evidence that the engineer had sounded the crossing signal at the proper point upon approaching the crossing, that fact would not relieve him from the duty of keeping a reasonable lookout as the engine approached the highway crossing; (3) that, under the facts of this particular case, the doctrine of last clear chance might properly have been applied by the jury, and that question should have been submitted to them under proper instructions.

On the other hand, defendant in error contends that the facts of the case bring it solely within the doctrine of concurring negligence, and there could be no recovery.

[1] The rule as to the degree of care imposed upon a railroad company in keeping a lookout to avoid inflicting injury at a crossing is stated in 33 Cyc. p. 923, to be "such as a prudent person would exercise under the circumstances at the particular time and crossing in endeavoring to perform his duty;" and the rule so stated has been repeatedly sanctioned by this court, one of its latest expressions being in *Southern Railway Company v. Hansbrough*, 107 Va. 733, 60 S. E. 58, cited in Cyc., supra. This court has also repeatedly sanctioned the rule, approved by practically all courts, that trainmen have a right to assume that a traveler will, in the discharge of his duty, take reasonable precautions for his own safety, that he will look and listen before undertaking to cross a railroad track, and that it is only after it comes to the knowledge of the trainmen (or by the exercise of ordinary diligence upon their part should come to their knowledge) that the traveler, disregarding his duty has placed himself in peril of which he was unconscious, that any duty devolves upon the trainmen to undertake to stop the train; and this rule has been applied even in a case of a child eight years of age, as well as in the case of an adult. *Southern Ry. Co. v. Daves*, 108 Va. 378, 61 S. E. 748. See, also, *Johnson v. C. & O. Ry. Co.*,

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91 Va. 171, 21 S. E. 238; C. & O. Ry. Co. v. Hall, 109 Va. 296, 63 S. E. 1007.

Assuming for argument's sake that the engineer in this case saw, or ought to have seen, plaintiff in error's decedent before or even after he had stepped over the west rail of the track, the rules to which we have just adverted apply, since there was no evidence tending to show that there was something in the appearance of the deceased to suggest to the engineer that he did not intend to remain in a place of safety until the train passed, or would be unable to clear the track after he had stepped over its west rail, before the engine reached the crossing, and to do this the decedent would have had to travel but a distance of less than 4½ feet. According to plaintiff in error's own evidence this freight train, traveling 30 or 35 miles an hour, was 105 yards south of the crossing when the decedent stepped across the first rail of the track upon which the train was approaching. The distance the train would have made and the distance the deceased should have traveled in the time it would have taken the engine to reach the crossing warranted the engineer in assuming that there was ample time for deceased to clear the track before being struck by the engine, there being nothing in his appearance to indicate that he was physically unable to do so or was unaware of his peril.

[2] Plaintiff in error's instructions A, B and C were properly refused. The latter told the jury that if they believed from the evidence that, after decedent had placed himself in a position of peril, the engineer could and would, by the exercise of ordinary care in keeping a reasonable lookout as the engine approached the crossing, have discovered the decedent in peril in time to have avoided striking him, defendant in error would be liable, notwithstanding decedent's negligence. In other words, the instruction sought to have applied to this case the doctrine of the last clear chance, when there was no evidence upon which it could be based, and therefore the doctrine invoked had no application whatever to the case. N. & W. Ry. Co. v. Davis, 108 Va. 514, 62 S. E. 337; C. & O. Ry. Co. v. Hall, *supra*; Southern Ry. Co. v. Bailey, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379.

It may be that if the engineer knew, or could have known by the exercise of reasonable care, that the decedent could not clear the track before the engine struck him, the engineer might have sufficiently reduced the speed of the train, so as to have avoided the collision; but there is no evidence whatever to support such a theory.

[3] The seven instructions given by the court fully and fairly submitted the case upon the evidence to the jury, and the objections made thereto are without merit.

The evidence has been sufficiently adverted to, in the statement

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of the case and in considering the instructions refused at the trial, to clearly show that this court would not be warranted in disturbing the verdict of the jury, approved by the circuit court, and therefore said judgment is affirmed.

Affirmed.

ARKANSAS CENT. RY. CO. v. WILLIAMS.

(Supreme Court of Arkansas, April 17, 1911.)

[137 S. W. Rep. 829.]

Railroads—Road Crossings—Duty of Travelers.*—A traveler struck by a train at a road crossing will be deemed to have seen and heard an approaching train in time to have avoided injury, if he had opportunity to do so, though he testifies that, though he looked and listened, he did not see or hear the train.

Railroads—Road Crossings—Injury to Traveler—Contributory Negligence—Jury Question.—Whether a traveler struck by a train at a railroad crossing was negligent in looking and listening held, under the evidence, a jury question.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by Andrew J. Williams against the Arkansas Central Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lovick P. Miles, T. B. Pryor, and Vincent M. Miles, for appellant.

Jo. Johnson, for appellee.

FRAUENTHAL, J. A. J. Williams, the plaintiff below, was struck by one of defendant's trains while he was attempting to cross over its railroad track at a public crossing, and was painfully and severely injured. In his complaint he alleged that the injury was caused by defendant's negligence, which consisted in failing to give the warning signal by bell or whistle of the train's approach to the crossing as required by section 6595 of Kirby's Digest. Defendant denied the allegations of negligence attributed to it, and pleaded contributory negligence on plaintiff's part as a bar to any right to recover. The trial of the case resulted in a verdict in favor of plaintiff for \$500, and defendant has appealed from the judgment entered thereon.

It is not insisted on this appeal that the evidence was insufficient to warrant the jury in finding that the defendant was neg-

*See first foot-note of *Averbuch v. Great Northern Ry. Co.* (Wash.), 38 R. R. R. 79, 61 Am. & Eng. R. Cas., N. S., 79.

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ligent in failing to ring the bell or blow the whistle as the train approached the crossing at which plaintiff was injured, or that the trial court erred in the declarations of law which it gave to the jury, or because of the refusal to give any instruction asked for; nor is it claimed that the amount of the damages returned by the jury is excessive. The sole ground urged upon this appeal why the judgment of the lower court should be reversed is that the undisputed evidence shows that the plaintiff was guilty of negligence which contributed to cause his injury, thereby barring him from recovery.

Somewhat briefly stated, the testimony adduced at the trial on the part of the plaintiff presented the following case: In the afternoon of September 3, 1909, plaintiff was traveling in a top buggy along a public highway known as the Greenwood & Ft. Smith road, and at a point known as Carnall Crossing he was struck by one of defendant's passenger trains while he was attempting to cross the track. At that place defendant's railroad runs from west to east, and is situated upon a prairie; but the track runs upgrade back towards the west from this crossing for a distance of about one-half mile, where it runs over an elevation called by some of the witnesses a hill. From this hill down to Carnall Crossing the track is straight, and the only obstructions along the railroad were some bushes which extended along the side of the railroad for some distance from the hill towards the crossing. The testimony on the part of the plaintiff tended to prove that, while these bushes were not as high as the smoke-stack of a locomotive, yet they were of sufficient height to obscure the view of a train when one was so situated that they were within the line of his vision. The train on this occasion ran from the west to the east, and the plaintiff was traveling in the public road from the northwest to the southeast, but for a considerable distance back from Carnall Crossing the highway ran almost parallel with the railroad, so that a train coming from the west was at his back. When he came to a point about 50 or 60 feet distant from the railroad crossing, the plaintiff stopped his horse and buggy, and looked up and down the track, and listened for a train, and, seeing none, he proceeded to the crossing in order to go over the track. He testified that, as he approached the crossing from this point, he continued to look up and down the track and to listen for a train, and that he heard and saw no train until his horse had gotten upon the railroad track. It appears that on each side of the crossing there was a cattle guard, and that the track was elevated somewhat above the public road. Plaintiff testified that at the moment he saw the train it was, as he thought, about 200 or 300 yards distant, and that he was unable to turn his horse on account of the narrowness of the road and the proximity of the cattle guards, and that he endeavored to rush his horse across the track to escape

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injury. It appears that the train was running downgrade at a great rate of speed, and that it struck the buggy in which plaintiff was seated, cutting it loose from the shafts and tugs so that it broke the buggy in peices, and knocked the plaintiff a distance of 60 feet, but did not injure the horse. Plaintiff was severely cut and injured about the head and body, and was carried upon the train back to Ft. Smith in an unconscious condition.

It appears from the testimony of the plaintiff that at the point in the public road where he stopped about 50 or 60 feet from the crossing the bushes, which extended down for a considerable distance from the hill along the side of the railroad, were in the line of his vision of the track, so that it might have obscured the view of the train for some distance down the track from the hill; and it further appears that these bushes may have obscured the view of the train from that point until the plaintiff's horse got on the track, when plaintiff first saw the train.

The festimony on the part of the defendant tended to prove that the railroad track at this place was perfectly straight for a distance of half a mile or more back from the crossing to the hill, and, had the plaintiff looked in that direction at any point in the highway for a distance of several hundred yards back from the crossing, he could not have failed to have seen the train. It is therefore earnestly insisted by counsel for the defendant that the physical facts show either that the plaintiff did not look in that direction, or that, if he did, he saw the train, and simply attempted to take the risk of crossing the track in front of it, and that this as a matter of law constituted contributory negligence on his part which bars him from recovery.

The principles of law that are applicable to cases like the one at bar, where a traveler has been injured by a train at a public crossing, have been repeatedly announced by this court. It has been held that it is negligence per se for one who approaches a railroad crossing to fail to look and listen for the approach of trains, and that it is only in exceptional cases that it is proper to submit to the jury the question as to whether the failure to exercise that precaution is excusable. It has been further held that such traveler must not only look and listen for the approach of a train before he goes upon a track, but he must continue to look and listen until he is past the point of danger, and that he must look both ways up and down the track. *Railway Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *L. R. & Ft. Smith Ry. Co. v. Blewett*, 65 Ark. 235, 45 S. W. 548; *St. L. & S. F. R. Co. v. Crabtree*, 69 Ark. 135, 62 S. W. 64; *St. L., I. M. & S. R. Co. v. Hitt*, 76 Ark. 225, 88 S. W. 911; *C., O. & G. Ry. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757; *Garrison v. St. L., I. M. & S. R. Co.*, 92 Ark. 437, 123 S. W. 657.

[1] Where the undisputed evidence shows that the injured

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person had an opportunity to see and hear the approach of the train at or before the time of the accident, and that his opportunity was such that he could not have failed to have seen or heard the train in time to have avoided the injury if he had used due care in looking and listening, then he will be deemed to have seen and heard the train, even though he should testify that he looked and listened and did not either hear or see the train. Under such circumstances, the fact that the person injured did not use the proper degree of care so clearly appears that it leaves no inference or fact in doubt, and, where such evidence is undisputed, the question of contributory negligence becomes a question of law for the court, and not of fact for the jury. As is said in the case of *St. L., I. M. & S. R. Co. v. Dillard*, 78 Ark. 520, 94 S. W. 617, the traveler "is deemed to have seen or heard what is plainly to be seen or heard." *Martin v. L. R., etc., Ry. Co.*, 62 Ark. 156, 34 S. W. 545; 33 Cyc. 1117.

[2] But, where the evidence is conflicting, the question as to whether or not the traveler at the public crossing did look and listen for an approaching train before reaching the crossing, and whether or not he did continue with vigilance and care until the point of danger was past, is ordinarily one of fact for the jury to determine. Unless the evidence is either uncontradicted or is indisputable to the effect that he did not look and listen, the verdict of a jury finding that the traveler did so look and listen should not be set aside as a matter of law. Where it is uncertain as to whether or not there was a possibility for the traveler to have been able to see or hear the approaching train, either because the evidence is conflicting or because there is doubt as to the inference to be drawn from the facts proved, the question of contributory negligence is properly one to be submitted to the jury. Under such circumstances, the question is left in doubt as to whether or not the party did look and listen for the approach of a train, and it cannot be said that it is conclusively shown that he did not do so when he testifies that he did. If there was an obstruction which obscured the view of the train within the line of the traveler's vision, then it cannot be conclusively inferred that he did not look, although by looking he did not see the train. 33 Cyc. 1118; *St. L., I. M. & S. R. Co. v. Johnson*, 74 Ark. 372, 86 S. W. 282; *St. L., I. M. & S. R. Co. v. Robt. Hitt*, 76 Ark. 227, 88 S. W. 908, 990; *C., O. & G. R. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757; *C., R. I. & Pac. Ry. Co. v. Moon*, 88 Ark. 231, 114 S. W. 228; *St. L., I. M. & S. R. Co. v. Garner*, 90 Ark. 19, 117 S. W. 763; *St. L., I. M. & S. Ry. Co. v. Stacks*, 134 S. W. 315.

In the case at bar the plaintiff testified that he did both look and listen at a point 50 or 60 feet distant from the crossing, and did continue to look and listen as he approached the track. We

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think that there was some evidence from which the jury were warranted in finding that he exercised this necessary precaution, but was prevented from discovering the approach of the train at any moment earlier than he did on account of its rapid approach, and the fact that his view of the train was obscured by bushes along the side of the railroad. We cannot say, therefore, that the physical facts as proved were such that it is indisputable that the plaintiff must have seen the train sooner than he did had he looked, or that it necessarily follows that he did not look when he testified that he did, although he did not see the train. During all the time that he was traveling from the point where he had stopped in the road until he reached the dump of the railroad, there was some evidence from which the jury might have found that the bushes along the side of the track were directly in the line of his vision and obscured any view of the train. The jury could under this testimony have very well found that he did look during all this time, and that he did not see the train.

We are therefore of the opinion that, under the facts and circumstances of this case, it was a question for the jury to determine as to whether or not the plaintiff did exercise the necessary precaution by looking and listening for the approach of trains before attempting to go over this public crossing, and that there was some evidence adduced upon the trial of the case upon which the finding that he did exercise that care and caution could be based. We cannot say, therefore, as a matter of law from this testimony that the plaintiff was guilty of contributory negligence.

The judgment is accordingly affirmed.

MYERS *v.* CHICAGO, B. & Q. R. CO.

(Supreme Court of Iowa, June 10, 1911.)

[131 N. W. Rep. 770.]

Parties—Amendment—Change as to Capacity.—A party suing in his own right may amend his pleading so as to sue in his representative capacity on the facts warranting it, and one suing in his representative capacity may amend by declaring as an individual, and in neither case is there a substantial change of the cause of action.

New Trial—Grounds—Allowing Amendment.—Where a husband brought an action for the loss of consortium for the wrongful death of his wife, the allowance of an amended petition by a third person as administrator of the wife for damages to her estate because of her death was not such an abuse of discretion as to justify a new trial after answer and judgment on the merits.

Parties—Pleading—Amendment—Allowance.—The right to amend the petition is as a general rule so limited as to prevent an amendment making an entire change of the parties on either side, or introducing an entirely new cause of action.

Appeal and Error—Harmless Error—Technical Errors Not Prejudicing Either Party.—Technical errors not prejudicing either party in the progress of the trial are not ground for reversal.

Railroads—Trespasser on Track—Liability.*—A person walking across a railroad trestle is a trespasser to whom the company owes no duty, save on observing his situation.

Railroads—Trespasser on Track—Negligence—Question for Jury.—Whether trainmen observing a trespasser on a trestle could have stopped the train in time to avoid running over him held, under the evidence, for the jury.

Railroads—Trespassers on Track—Contributory Negligence—Question for Jury.—What a person on a railroad trestle exposed to the danger of an approaching train sounding an alarm, should, in the exercise of ordinary prudence do for his protection, held for the jury.

Death—Married Woman—Right of Action.—Ordinarily the services of a wife belong to her husband, and, unless she is engaged in an independent occupation, her death does not occasion loss to her estate.

Death—Action for Negligent Death of Wife—Independent Occupation of Wife—Question for Jury.—In an action for the negligent death of a wife brought by her administrator for damages to her estate, evidence held to make a case for the jury on the question whether she pursued an independent occupation.

*See foot-note of Covington, etc., Co. *v.* Marsh (Ky.), 38 R. R. R. 196, 61 Am. & Eng. R. Cas., N. S., 196; Schmidt *v.* Pennsylvania R. R. (C. C. A.), 38 R. R. R. 645, 61 Am. & Eng. R. Cas., N. S., 645; last foot-note of Birmingham Southern R. Co. *v.* Fox (Ala.), 37 R. R. R. 407, 60 Am. & Eng. R. Cas., N. S., 407.

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Death—Action for Negligent Death of Wife—Independent Occupation of Wife.—The mere fact that a married woman was not, at the time of her wrongful death, pursuing an independent occupation, does not defeat a recovery for damages to her estate where she had been prevented, by a temporary illness from which she had recovered, from pursuing such occupation, and where but for her death she would have pursued it.

Trial—Argument of Counsel.†—The act of counsel for plaintiff suing a railroad company for the death of a person struck by a train, in referring in his argument to the train crew as a “gang” instead of a crew, is not misconduct, necessitating the setting aside of a judgment for plaintiff.

Evans, J., dissenting.

Appeal from District Court, Mills County; W. R. Green, Judge.

Action for damages resulted in judgment against defendant, from which it appeals. Affirmed.

Arthur E. Wells and W. S. Lewis, for appellant.

Gülliland & Logan and Genung & Genung, for appellee.

LADD, J. [1] This action was first begun by William Myers who claimed damages for loss of consortium as the result of the alleged wrongful acts of defendant's employees causing the death of his wife. A demurrer to the petition having been sustained (see *Seney v. Ry.*, 125 Iowa, 290, 101 N. W. 76), an amended and substituted petition was filed by F. K. Myers, as administrator of the decedent, claiming damages to her estate. Defendant moved that this be stricken because that it changed parties plaintiff and alleged a new cause of action. This motion is overruled and exception is taken thereto though answer subsequently was filed. Where a party sues in his own right, he may, if the facts warrant, amend his complaint so as to make the suit stand in his representative capacity, and conversely, if he sues in his representative capacity, he may be allowed to amend by declaring as an individual; and in neither instance is it considered a substantial change of the cause of action. *Hunt v. Collins*, 4 Iowa, 56; *Hume v. Kelley*, 28 Or. 398, 43 Pac. 380; *Smith v. Anderson*, 39 Tex. 496; *Buffington v. Blackwell*, 52 Ga. 129; 1 Encv. P. & P. 538.

[2-4] In *Wells v. Stombock*, 59 Iowa, 376, 13 N. W. 339, a township had brought suit, and when a demurrer to the petition was sustained on the ground that a township was without capacity to sue, the plaintiff as township clerk, was allowed to

†For the authorities in this series on the subject of the arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-note of *Louisville & N. R. Co. v. Payne* (Ky.), 36 R. R. 606, 59 Am. & Eng. R. Cas., N. S., 606; last head-note of *Louisville R. Co. v. Mitchell* (Ky.), 36 R. R. 710, 59 Am. & Eng. R. Cas., N. S., 710.

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file an amendment to the petition asserting his right to maintain the cause of action alleged in the petition. The ruling was approved, the court, through Seevers, C. J., saying, in response to the suggestion that as there was no plaintiff named, there was no petition to amend: "We think when there is an appearance to the action, and the defendant tests the right of the named plaintiff to maintain the action by a demurrer, and the latter is sustained, the name of the proper parties plaintiff may be substituted in the action by an amended petition, subject of course to an apportionment of the costs and the right of the defendants to a continuance if taken by surprise. If this is not the rule, the action must abate and another be brought. This, under the statute, should not be the rule unless substantial justice so demands. The statute in terms provides the court in furtherance of justice may permit a party to amend any pleading "by adding or striking out the name of a party * * * or by inserting other allegations material to the case, or, when the amendment does not charge substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved." Code 1873, § 2689. There the original plaintiff was without capacity to sue; here though with capacity, he might not maintain the action. In each case the transaction on which action was based remained unchanged. Had the original plaintiff been substituted as administrator of the estate of decedent, there could be no doubt of the propriety of the ruling permitting this to be done, and we are inclined to the view that the substitution of another as such administrator is within the rule of the above decision, and, in the circumstances disclosed, ought not to be regarded as such an abuse of discretion that, after answer and judgments on the merits, a new trial should be ordered. We do not overlook the general rule which limits the right to amend from making an entire change of the parties on either side and stops short of the introduction of an entirely new cause of action. *State v. Turner*, 96 N. C. 416, 2 S. E. 51; *Steed v. McIntyre*, 68 Ala. 407. Nor do we forget that reversals are not to result from technical errors which could not have prejudiced either party in the progress of the trial. The ruling, however, is not without other support. See *Wood v. Lenawee*, Circuit Judge, 84 Mich. 521, 47 N. W. 1103, where the court held that in an action on a policy of life insurance by the administrator of the estate of a person not entitled thereto, the real parties interested might be substituted as plaintiff by an amendment, though at the time an independent suit by them would have been barred. Though to have sustained the motion would not have been error, overruling it was not prejudicial to the rights of the parties, and therefore is not ground for reversal.

2. Appellant contends that the evidence was insufficient to sustain the finding that the collision was due to the negligence

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of its employees. It appears that in the morning of July 17, 1909, Abby Myers and her daughter Hazel, then about 14 years of age, left Glenwood for Pacific Junction by train at 6:30 o'clock. Upon reaching that place, they walked out along defendant's railway on the way to the home of another daughter about $2\frac{1}{2}$ miles distant. Arriving at a trestle 1,070 feet long, they rested, and then, as no train was heard coming, proceeded on their way. When about half way over the trestle they heard a whistle and hurried on in order to get across before the train reached them. According to Hazel's testimony, "When the train came around the bend, it whistled a long and a short whistle and then when it got up to the bridge, it whistled the alarm." This was followed by several short blasts and when the train reached the end of the bridge about 22 feet away, she jumped from the trestle into the water below, about ankle deep, and, on alighting, saw her mother hurled through the air and fall about 10 feet east of her. Quoting: "When the engineer first sounded the alarm just before I jumped off the trestle, I think the engine was right at the bridge. I could not tell just the distance. There were no sharp whistles sounded I know of before the engine was at the bridge and this was just before I jumped. * * * I do not think I can recollect how far the engine was away or how far the train was from me when I jumped. I was so frightened and confused at the time, I am unable to give the distance." As she jumped her mother, though frightened, was erect and moving forward. This trestle or bridge was covered with cinders and was about eight feet above the surface. There was a highway crossing 1,045 feet west of the west end. The whistling post was 1,633 feet beyond this crossing. The railway over the trestle and to this whistling post was straight and from there on curved to the southwest. The train consisted of the engine, tender, and 59 cars, all but 10 or 11 of which were heavily loaded. The train as it came around the curve was moving at the speed of 25 or 30 miles an hour, and the engineer at that time first observed some object on the track but could not distinguish what at that distance nor determine whether on the trestle. As soon as he got on the direct line he noticed, according to his testimony, that the objects ahead were human beings, but as the ballasting was the same on the trestle as on the roadbed he could not yet detect whether they were west of the trestle or on it. Upon reaching the highway crossing, he noticed that the two persons were women at or near the trestle, and, according to his testimony, he immediately "applied the air, in the emergency, and opened the sand boxes," thereby doing everything possible to stop the train. He testified that when it finally stopped "eleven cars were on the trestle." He further testified: "I whistled twice for the road crossing, and they did not seem to get off the track. That was before I struck the crossing and

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west of the road crossing. I had whistled twice. They didn't seem to move. They didn't seem to get off the track. When I got at the road crossing I set my air in the emergency, and I sounded the stop alarm or the short blasts. I kept up the short blasts. I began this as soon as I set my air in the emergency, and I kept this up until I was right on the bridge. I kept my eyes on these women. When I got within about ten or twelve cars length of the woman, she dropped down in the center of the track on the left side near the left rail as if fainting or something like that. I should say the engine was probably ten or twelve cars length away from her when she seemed to drop down. There is about 38 feet to the car. I could see her until the engine was probably 2 or 3 cars length away. The little girl was running toward the end of the bridge the last I saw of her. When Mrs. Myers sank down, I would say she was not over 10 feet from the end of the bridge." From the bridge over the Missouri river east is downgrade until reaching the curve mentioned and from there on appears to have been nearly level. The engineer had shut off steam at the curve and was allowing the train to drift. The evidence of the other trainmen tended to corroborate the story of the engineer and to show that Hazel instead of jumping from ran off the trestle at the west end.

[5] There was evidence tending to show that neither Hazel's shoes nor her dress were wet or muddy, and that the mother's body fell about 17 feet east of the end of the trestle. The evidence was such as to carry the issue as to defendant's negligence to the jury. The decedent and her daughter were trespassers to whom the defendant owed no duty save upon observing their situation. The engineer saw objects on the track as the engine turned the curve, and as it came from the curve on the straight line he recognized these as human beings, but could not determine whether they were on the trestle. As the whistle blew for the highway crossing, 2,682 feet from the trestle, he could not see them move. This indicated they were coming toward him if moving. He kept his eyes on them, but for what purpose, if not to enable him to stop his train if necessary to avoid a collision? And yet he made no effort save to turn off the steam, to reduce the speed of this rapidly moving train which he must have known could not have been readily stopped until the engine reached the highway crossing but 1,047 feet from the end of the trestle, or so near that according to his testimony he could not have stopped before reaching it. Hazel testified that the engine was much nearer when the air was applied to the brakes for according to the engineer this was done as the short blasts began. She also testified that the engine when it stopped was east of the trestle, and defendant's employees were of opinion the train was moving 15 miles an hour when it struck decedent. If her story is to be believed the engineer did

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not apply the brakes until near the trestle and long after he must have been aware of decedent's peril. The engineer thought such a train might be stopped within 35 car lengths; the fireman estimated the distance from 30 to 40 cars. On the other hand, Groom who had been an engineer for 16 years, though but when one-fifth of the cars had air brakes, estimated that such a train might be stopped in moving one-half its length. One Hamilton, whose experience did not justify much weight being given to his testimony, fixed the distance at 300 feet. He had worked as fireman four years from 1900, but testified that 59 cars were not being handled in a train at that time, and that he had never fired on an R. 5. engine, but had on an R. 4. and that he had never run an engine. The jury might have found the average length of cars 38 feet, and unless the testimony of Hamilton were relied on that the train must have moved 1,100 to 1,200 feet after the application of air before stopping. If the train must have moved this distance, the engineer in the exercise of ordinary care for the protection of human life should have slowed his train before reaching the highway crossing so that if it turned out that the decedent and her daughter were on the trestle, the engine might have been stopped in time to avoid the injury. He ought not, after observing them, to have speculated on whether they were on the trestle or might get off until the engine had come so near that a collision could not in all reasonable probability be avoided. .

[6] In view of the uncertainty as to when the air was turned on and the distance within which the train might have been stopped, and whether the engineer ought not to have slowed his train before reaching the highway crossing, the issue as to whether in the exercise of ordinary care he ought to have stopped the train in time to avoid the collision was for the jury.

[7] 3. As the train neared decedent, she appeared to have collapsed from fright or some other cause, and appellant contends that but for this she would have reached the end of the trestle in safety. If she was 22 feet therefrom, as testified by her daughter, the jury might have found she could not have done so, and must have escaped if at all by jumping from the bridge. The trestle was about 8 feet high at that point, and likely she did not know the depth of the water below. What a person so situated and exposed to the menace of an on-coming train with alarms sounding, in the exercise of ordinary prudence should have done, was for the jury to say.

[8] 4. Ordinarily, the services of the wife belong to the husband, and therefore, unless she is engaged in an independent occupation, her death cannot well be said to have occasioned loss to her estate. *Tuttle v. Ry.*, 42 Iowa, 518; *Nichols v. Ry.*, 68 Iowa, 732, 28 N. W. 44.

[9] Appellant contends that the evidence fails to show that

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decedent pursued an independent calling even in part. It was somewhat meager. William Myers testified that she had taken in washing, but not during the 18 months prior to her death, that she had helped him in his tailor shop for which she received no compensation; that she had earned from \$3 to \$7 nearly every week at washing and used the money as she pleased; that she had not been taking in washing recently because of not being well, due to change of life, but had about recovered; that prior to November 1, 1906, he was absent 2 years and 9 months, and so far as he knew his wife earned the support of the family in his absence. Hazel testified to her mother taking in washing, receiving the money therefor, and that she bought clothes for the family with it. The jury might have found from this that decedent had an occupation separate and apart from her household duties which she had followed until her health was impaired. She had collected her earnings as she was entitled to under the law, and it was inferable from the evidence adduced that she would resume the work at which she had been engaged upon the complete restoration of her health. That she had been assisting her husband in the shop was a circumstance tending to indicate the abandonment of an independent employment, but whether she had done so was for the jury to say. Though the employment she had been engaged in may have been humble, if separate and apart from that of her husband, and she received the emoluments, this was sufficient to make out a case for the jury. *Flemming v. Shenandoah*, 67 Iowa, 505, 25 N. W. 752, 56 Am. Rep. 354. See *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831.

[10] The court rightly instructed that the mere fact, if it be a fact, that she was not at the time of the accident pursuing this occupation would not be sufficient to defeat a recovery, if it was found that she had been prevented by a temporary illness from which she had recovered, but for her death; and but for the accident in question she would have resumed and continued such occupation. The status of the law which denies a cause of action to the husband because of the wrongful death of the wife when instantaneous and refuses damages to the administrator unless she pursued a separate vocation does not especially commend itself to modern standards of justice, and, to avoid the apparent hardship, courts are not inclined to scrutinize too closely evidence of independent employment, but to uphold the conclusion a jury may reach if an inference to that effect may be drawn from all the evidence adduced. The issue was for the jury.

[11] 5. Complaint is made of the alleged misconduct of counsel. Whatever was said of an objectionable nature appears to have been in response to arguments of counsel for appellant. That counsel referred to the crew on defendant's train as a "gang" instead of a crew can scarcely be thought misconduct.

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While impropriety tending to the prejudice of a party must be avoided even in argument, too great nicety in the choice of words ought not to be exacted. There was no error.

6. The decedent was 42 years of age and the mother of 7 children. Her expectancy according to the life tables was 26.75 years. She had earned but \$3 to \$7 per week when working independently, and conceding that upon recovery of her health she would have resumed her vocation of taking in washings, the extent of her earnings was somewhat problematical. She had accumulated no estate at the time of her death and whether she would have done so no one can say. In other words the record was such as to leave the inquiry as the injury to her estate was largely one of conjecture, but this necessarily must be so of all matters involving the future, and especially with reference to those relating to the probable accumulation of property. We are not inclined to interfere with the verdict, and the judgment is affirmed.

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(Supreme Court of Georgia, June 13, 1911.)

[71 S. E. Rep. 665.]

Railroads—Blocking Highway—Negligence—Right of Action.*—

Under the evidence it was for the jury to determine whether it was negligence to obstruct the highway, and whether the death of the plaintiff's daughter resulted from becoming wet and chilled while standing in the rain waiting for the crossing to be cleared, and was proximately caused by the blocking of the highway. It was error to direct a verdict for the defendant.

Fish, C. J., and Beck, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; G. W. Maddox, Judge.

Action by Cornelia Crow against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Judgment reversed.

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see third foot-note of *Grand Trunk Western Ry. Co. v. Poole* (Ind.), 38 R. R. R. 477, 61 Am. & Eng. R. Cas., N. S., 477; fifth head-note of *Penny v. Atlantic C. L. R. Co.* (N. C.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535; foot-note of *Chesapeake, etc., Ry. Co. v. Wills* (Va.), 37 R. R. R. 577, 60 Am. & Eng. R. Cas., N. S., 577.

For the authorities in this series on the subject of the liability of a railroad for injuries resulting from obstructing crossings with cars or trains, see first foot-note of *Lindler v. Southern R. Co.* (S. C.), 36 R. R. R. 334, 59 Am. & Eng. R. Cas., N. S., 334.

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M. B. Eubanks and W. B. Mebane, for plaintiff in error.

Geo. A. H. Harris & Sons and Maddox, McCamy & Shumate, for defendant in error.

EVANS, P. J. Mrs. Cornelia Crow brought suit against the Southern Railway Company to recover damages, because of the death of her minor daughter, alleged to have resulted from exposure to inclement weather while waiting for the clearing of a freight train which blocked the highway between the daughter's place of work and her home. On the trial evidence was submitted by the plaintiff and defendant, at the conclusion of which the court directed a verdict. The exception is to the direction of a verdict.

The material part of the evidence submitted by the plaintiff was as follows: The plaintiff's daughter, a strong and healthy girl of the age of 18, was employed in a factory located in a town of 5,000 inhabitants, and earned \$1 per day, most of which she contributed to her mother's support. The factory employed about 2,000 operatives, and suspended work at the usual time (about 15 minutes past 6 o'clock) on the evening of November 22, 1907. It was a cold, rainy night. When the plaintiff's daughter came out of the mill, "it was raining as hard as it could." She, with many others of the mill operatives, came through the mill gate and proceeded along the highway on her way home until she reached the spur track of the railway company which entered the mill yard, and which was 30 yards distant from the mill gate. The highway was obstructed at this place by a freight train with 30 cars, half of the train projecting on either side of the highway. Inside of the factory inclosure and near the gate, about 40 yards from the railroad crossing, there is a waiting shed. There is also a hotel near the crossing, about the same distance as the waiting shed. She waited in the rain for about 30 or 40 minutes for the crossing to be cleared, when she proceeded home. One witness testified that it would have been difficult, and not a safe way, for ladies to have gone around the train; and another witness testified that she could not go around the cars. After the employees leave, the gates of the factory yard are shut and locked, and no one except the night watchman is permitted to enter the yard. When the plaintiff's daughter came out of the mill, and discovered that it was raining and that the crossing was blocked, she could have returned to the yard and have taken shelter under the shed before the gate was shut. There was a means of exit from the rear of the mill; but a person must needs go under a railroad trestle, and it would have been 300 yards further to the plaintiff's home. The effect of becoming wet and chilled from standing in the rain was to suppress the menses of the plaintiff's daughter and to produce vicarious menstruation, which caused her death in June of the

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next year. A physician testified that one is more likely to catch cold and contract disease standing still in the rain and becoming thoroughly wet than when walking in the rain.

The defendant submitted testimony that the plaintiff's daughter died of tuberculosis; that she lived with her brother and sister-in-law, who died of tuberculosis; that this disease is a germ disease, and is communicable; that the freight train had several heavy laden cars and was switched into the siding to its extreme length; and as the engineer attempted to move the train forward a coupling on the third car from the engine broke. Several unsuccessful attempts were made to connect the coupling, and then the car with the broken coupling was cut loose from the others, and signalmen sent out on the main line to flag approaching passenger trains, which were then due from opposite directions. After arranging for the signals for the passenger trains, the car with the broken coupling was drilled out and left on a spur track, and the engine was brought back and connected with the remaining cars and the crossing was cleared. This work consumed about 30 or 40 minutes, and could not have been accomplished in less time. The conductor testified that it was his duty to carry with his train chains with which to fix couplings. He had a chain with him, but it was left on a disabled car at the last stopping place. If the servants in charge of the train had had a chain, the train could have been pulled off the crossing. The engineer and conductor did not inform any one in the waiting crowd at the crossing while it was obstructed by the train that the train was broken down and could not get away. They knew that the factory usually suspended work about 6:15 o'clock in the afternoon, and that it employed a large number of operatives, many of whom lived in houses located beyond the crossing. The master mechanic of the factory testified that the night watchman has until 10 minutes to 7 to permit employees to leave the mill, at which time he closes the gates. There could not have been much difference in the distance to the home of the plaintiff's daughter by leaving the front or rear exit. There was nothing to prevent the plaintiff's daughter, upon discovering that the crossing was blocked, to have returned to the mill yard and leaving through the back gate.

The plaintiff's case is based upon the propositions that the railway company was negligent in blocking the crossing, and that this negligent act proximately induced her daughter's fatal illness. We think both of these propositions were supported by proof sufficient to require the submission of the issues to a jury. It was inferable from the evidence that the crossing was blocked for a much longer time than would have been necessary, had the servants of the railway company been provided with chains to use in substitution of a broken drawhead. The conductor testified that it was his duty to carry chains in anticipation of

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accidents to car couplings, and that, if the train had been supplied with a chain, the train could have been pulled off the crossing by its use. It is true that when the train started on its journey it was furnished with one chain; but this had been left on a disabled car, which was sidetracked at the last stopping place. It was for the jury to say under these circumstances whether the crossing was negligently blocked an unreasonable time.

The other proposition contains two elements: (1) Whether it is possible from the evidence to distinguish between the act of the defendant and the deceased as the cause of the injury; and (2) whether the proximate cause of the injury was the decedent's own negligence in voluntarily standing in the rain, when she could have gone home by a different route, or could have gained shelter in the hotel or shed which were near by. In considering this matter, we must take the evidence in its most favorable aspect to the plaintiff, as a verdict was directed for the defendant, and she was deprived by this action of having the jury pass upon any conflict in the evidence. We may concede that if between the cause of an injury from obstructing a highway the negligence of the injured person intervenes, so that the injury is the direct consequence of his negligence as well as the negligent obstruction of the highway, and it is not possible to determine what portion of the injury is caused by either, or that any substantial injury would have been received except for the negligence of the person injured, no action can be maintained for the injury. 5 Thomp. Neg. § 6237. But one who negligently causes an injury will not be heard to say that part of the mischief would not have arisen if the injured party had not been guilty of some negligence. If one negligently injures a person afflicted with a disease, which injury aggravates or accelerates the course of the malady, he is still responsible for his tortious act. The injured person's affliction is to be considered in the estimate of damages, but does not excuse the tort-feasor's act. The plaintiff's evidence tended to show that the fatal illness of the decedent was caused from her standing in the rain upon a cold night. A physician testified that one is more likely to catch cold and contract disease standing still in the rain and becoming thoroughly wet than when walking in the rain. It was for the jury to say whether the decedent's voluntarily leaving the mill in the rain would have produced her illness, if she had been permitted to walk home, instead of being detained in the rain for half an hour at the crossing.

Likewise the jury should have been allowed to pass upon the alleged contributory negligence of the decedent. It is inferable from the evidence that a mill shelter and hotel were near by and accessible to the decedent, and that she could have repaired to either of these places while waiting the clearance of the cross-

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ing. The evidence also discloses that, while the train was blocking the crossing, the agents in charge of it, though seeing that a number of persons were delayed because of an obstructed highway, did not inform the waiting crowd of the cause of the delay, or when the train was likely to move. It did appear that the broken coupling was on the third car, which was 12 car lengths away from the crossing. The jury might have been of the opinion from the facts (and the inference would not have been unwarranted) that the decedent momentarily expected the crossing to be cleared, and that she was not negligent in remaining on that assumption, rather than going to a shelter, or taking a more circuitous and less convenient route to her home.

Judgment reversed. All the Justices concur, except

FISH, C. J., and BECK, J. (dissenting). In our opinion the evidence was wholly insufficient to show that the defendant's negligence was the proximate cause of the death of the plaintiff's daughter, and therefore the court properly directed a verdict for the defendant.

SESSIONS *et al.* v. SOUTHERN PAC. CO. *et al.*

(Supreme Court of California, March 23, 1911. Rehearing Denied April 21, 1911.)

[114 Pac. Rep. 982.]

Appeal and Error—Time to Appeal—Appeal from Judgment.—The Supreme Court has no jurisdiction of an appeal from a judgment taken more than six months after entry thereof.

Trial—Special Interrogatories—Inconsistent Answers.—Special findings of the jury in reply to interrogatories which are in direct conflict with other findings and with the uncontradicted evidence must be disregarded.

Carriers—Injuries to Passengers—Trespasser—Fraud of Passenger—"Passenger without Reward."*—A person who obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of the want of authority on the part of the conductor to allow such free passage, is not a lawful passenger without reward within Civ. Code, § 2096, requiring ordinary care and diligence for his safe carriage, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured.

Carriers—Passengers—Trespassers—Evidence.*—In an action for

*For the authorities in this series on the care due trespassers on trains or street cars, see first foot-note of *Broyles v. Central of Ga. R. Co.* (Ala.), 36 R. R. R. 155, 59 Am. & Eng. R. Cas., N. S., 155; last paragraph of first foot-note of *Welch v. Boston* (Mass.), 35 R. R. R. 35, 58 Am. & Eng. R. Cas., N. S., 35.

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the negligent killing of a person in a rear end collision between defendant's trains, evidence held to show that decedent took passage on the train pursuant to an arrangement with the conductor for free passage, and knowing that the conductor had no right to allow him to ride free, rendering him merely a trespasser on the train, to whom the carrier was not liable for injuries, unless willfully or wantonly inflicted.

Department 1. Appeal from Superior Court, Alameda County, T. W. Harris, Judge.

Action by Ella A. Sessions and another against the Southern Pacific Company and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Appeal from judgment dismissed, and order denying a new trial reversed.

Frank McGowan and McGowan, Squires & Westlake (Wm. F. Herrin and P. F. Dunne, of counsel), for appellants.

W. B. Rinchart and Welles Whitmore, for respondents.

SHAW, J. This is an action to recover damages arising from the death of Charles A. Sessions, alleged to have been caused by the negligence of defendants. The plaintiffs are, respectively, the widow and the only child of the decedent. They recovered judgment for \$5,000 in the court below. In addition to the general verdict the jury made answer to certain questions of fact. The defendants moved the court under section 663 of the Code of Civil Procedure for judgment in their favor upon the answers to these questions. The court denied the motion. The defendants' motion for new trial was also denied. From the judgment and from these orders the defendants appeal. The verdict and judgment were against the Southern Pacific Company alone. It would seem, therefore, that the defendant Cole is not aggrieved and has no right of appeal, but, as the objection is not raised, we will not consider the question. [1] The appeal from the judgment was taken more than six months after it was entered. This court therefore has no jurisdiction thereof, and that appeal must be dismissed.

In support of the appeal from the order denying the motion for a new trial, it is contended that the verdict is not sustained by the evidence, and that the court erred in giving and refusing instructions and in rulings upon the admission of evidence. In view of our conclusion as to the sufficiency of the evidence to sustain the general verdict and one of the special findings, it will be unnecessary to consider the appeal from the order refusing to enter judgment for the defendants or the rulings upon instructions and upon the admission of evidence.

The defendant company was operating a railroad running from the Oakland mole in Alameda county, through the city of Fresno to Los Angeles. At the time of his death, December 20, 1902,

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Sessions was on board one of the company's passenger trains known as the "Owl" on a trip from Oakland to Fresno. At Byron station another train operated by the company ran into the rear coach of the "Owl" train, and Sessions was killed by the collision. The complaint alleges that Sessions had paid for his passage, and was riding as a passenger on said train. The principal controversy at the trial and upon this appeal is over the question whether he did sustain that relation to the company or was a trespasser on the train. [2] In answer to interrogatories the jury found that Sessions did not purchase a ticket for the trip, nor pay any money or other consideration therefor, and that he accepted free passage on the train by invitation of the conductor in charge thereof. In answer to other interrogatories, the jury found that Sessions was not riding on the train by invitation of the conductor or with the understanding between him and the conductor that he should ride without paying fare, but, as these findings are inconsistent with the findings first above stated, and are also contrary to the undisputed evidence, they will be disregarded. The evidence, without substantial conflict, showed the following facts. A man named Teeple had been running the "Owl" train as conductor from Oakland as far as Fresno for about two weeks prior to the day of the accident, in place of one Dolan, the regular conductor, who had been sick. On that day, in Oakland, an hour or two before the train left the mole, Teeple arranged with Sessions to carry Sessions on the "Owl" train from the Oakland mole to Fresno and back to Oakland without charge and as his guest; it being arranged that Sessions was to take the train at the mole. When Sessions arrived at the mole, Teeple had learned that Dolan had resumed work, and would take out the "Owl" train on that trip. Teeple then gave Sessions an old and expired trip pass running to Teeple and told Sessions to hand it to the conductor, Dolan, when he came to collect tickets on the train, and that Dolan would punch it and hand it back to him. Teeple then saw Dolan and arranged with him to punch the pass as if it were a ticket, and allow Sessions to ride on the train free in pursuance of the agreement he, Teeple, had made with Sessions. Under this arrangement, Sessions entered the train and began the trip. When Dolan came around to collect the tickets, Sessions handed him the pass and Dolan took it, punched it, and handed it back to Sessions, as Teeple had directed. Thereafter Sessions continued on the train until the collision occurred. A rule of the company forbade the carrying of passengers without payment of fare.

There is some conflict in the authorities with respect to the degree of care due from a carrier to a passenger who does not pay fare for his passage and is carried free. In this state,

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however, the question is settled by sections 2096 and 2100 of the Civil Code which are as follows:

"Sec. 2096. A carrier of persons without reward must use ordinary care and diligence for their safe carriage."

"Sec. 2100. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Both parties devote much space in their brief to a discussion of the questions whether or not the company under the circumstances was bound to use the utmost care and diligence for the safe carriage of Sessions or only ordinary care to that end, and to the question whether or not the conductor of a train is presumed to have authority to carry a passenger free or is presumed not to have such authority. We do not find it necessary to consider at length these propositions. One of the propositions of the appellant is that the company never made any lawful contract to carry Sessions as a passenger or at all, that he rode on the train by means of a fraudulent contrivance with the conductor, and that his status was that of a trespasser toward whom the company owed no duty except to avoid doing him a willful or wanton injury. There is no evidence sufficient to show that the collision which caused the death of Sessions was due to the willful or wanton negligence or recklessness of the company. This being the case, it follows that if the decedent was, at the time of the collision, a trespasser on the train, the company is not liable in damages for his death. [3] It is well settled by the authorities, and in fact it is not controverted by the plaintiffs, that if a person obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of the want of authority of the conductor to allow such free passage, such person does not become a lawful passenger without reward under section 2096 aforesaid, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured. *Condran v. Chicago, etc., Co.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; *McVeety v. St. Paul, etc., Co.*, 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; *Louisville, etc., Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Purple v. Union, etc., Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 703. Many other decisions could be cited to the same effect. It is not necessary to extend the list. The jury found specially that Sessions did not accept free passage on that trip with the intent to defraud the defendant company. [4] This finding is clearly contrary to the evidence above related. The arrangement which was made by Teeple and Dolan to allow Sessions to ride on the train without payment of fare was sufficient to inform him, or at least to give

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him good cause to believe, that the conductor of that train had no authority to carry him without charge. The very terms of the agreement and the manner in which it was to be carried out, of all of which he was fully aware, were sufficient to cause him, as a reasonable man, to believe that it was contrary to the rules of the company to allow him free passage. The obvious purpose in giving him the expired pass to be handed to the conductor to be punched and returned as if it were a ticket was to prevent any agent of the company or any person who might inform the company of the fact from discovering that the conductor was allowing Sessions to ride without presenting a ticket. There is no other reasonable explanation of the device. It was a plan designed and carried out to conceal the evasion of the payment of fare, and the only fair inference from the making of it would be that the conductor was required by the company to exact payment of fare or a ticket from every person riding on the train. The decedent was thereby charged with knowledge of this lack of authority to pass him free. He was in collusion with the conductor to defraud the company of the amount of his fare. Under the authorities cited, his status was that of a trespasser, and not that of a passenger. The special finding was therefore contrary to the evidence, and the defendant was not liable in damages for causing his death unless it had been guilty of willful or wanton injury which the evidence does not show. The court should have granted the motion for a new trial.

It is ordered that the appeal from the judgment be dismissed, that the judgment be vacated, and that the order denying a motion for a new trial be reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

ST. LOUIS & S. F. R. CO. *v.* WILLIAMS.

(Supreme Court of Arkansas, Feb. 27, 1911.)

[135 S. W. Rep. 804.]

Negligence—Torpedo on Railroad Track—Injuries to Children—Question for Jury.—Defendant's road has a branch line joining the main line a short distance from a station, and between the junction and the station there are frequent curves and obstructions which prevent a view along the track for any considerable distance. In accordance with a custom of many years, the brakeman of a train coming in from the branch line and stopping at the station placed a torpedo signal on the track between the junction and the station, when recalled to the train after being sent out to flag incoming trains. People were accustomed to walk and children to play on or about the track. Plaintiff, 11 years' old, and a younger brother, saw the torpedo placed on the track, and the brother carried it to plaintiff who exploded it with an ax and was injured. Held, that the question of contributory negligence in exploding the torpedo was properly submitted to the jury, and that the jury was justified in finding that plaintiff was not guilty of negligence, but that it was error to submit the question of defendant's negligence to the jury.

Railroads—Trespassers—Liability for Injuries.*—Railroad companies have the right to the exclusive possession of their own premises, except at crossings or about stations where people have a right to go, and the servants of the company need not anticipate the presence of trespassers, except as to keeping a lookout in the operation of trains required by statute, nor need they anticipate the presence of children where they have no right to be, except where the premises left unguarded are so attractive to children that injury may be reasonably anticipated from failure to guard them.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by J. C. Williams, by next friend, W. R. Williams.

*For the authorities in this series on the subject of the duties of trainmen to licensees or trespassers on railroad tracks before their presence is discovered, see foot-note of *Schmidt v. Pennsylvania R. R.* (C. C. A.), 38 R. R. R. 645, 61 Am. & Eng. R. Cas., N. S., 645; foot-note of *Covington, etc., Co. v. Marsh* (Ky.), 38 R. R. R. 196, 61 Am. & Eng. R. Cas., N. S., 196; last foot-note of *Chicago, etc., Ry. Co. v. Smith* (Ark.), 37 R. R. R. 51, 60 Am. & Eng. R. Cas., N. S., 51.

For the authorities in this series on the subject of the care due from railroad companies to children trespassing on its cars or premises, see foot-note of *Berg v. Duluth, etc., Ry. Co.* (Minn.), 37 R. R. R. 392, 60 Am. & Eng. R. Cas., N. S., 392.

For the authorities in this series on the subject of the negligence of railroad companies in maintaining things dangerous and attractive to children, and in failing to warn them of the danger, see foot-note of *Stollery v. Cicero & P. St. Ry. Co.* (Ill.), 34 R. R. R. 723, 57 Am. & Eng. R. Cas., N. S., 723.

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against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

W. F. Evans and *B. R. Davidson*, for appellant.

Sam R. Chew, for appellee.

MCCULLOCH, C. J. The plaintiff, J. C. Williams, then 11 years of age, was injured by the explosion of a torpedo picked up on the railroad track of defendant by his younger brother, Ellis Williams, and sues to recover damages. The boys lived with their parents a short distance from the railroad track in the city of Fayetteville, Ark. They saw the brakeman of a train place the torpedo on the track, and the younger one went out on the track and picked it up and carried it to plaintiff, requesting him to "mash it," which he proceeded to do, placing it on a rock and striking it with an ax. Some of the particles struck plaintiff in the eye and destroyed the sight.

There was no dispute as to the material facts. The defendant operates a branch line known as the "St. Paul Branch," which runs east from the main line at Fayette Junction, about two miles south of the passenger station at Fayetteville. Another branch, called the "O. & C.," runs west leaving the main line a short distance south of the station. The trains from these branches come in on the main track to reach the Fayetteville station, which is used by all of defendant's trains on the main line as well as on the branch lines. The track between Fayette Junction and the Fayetteville station has frequent curves, and there are obstructions which prevent a view up and down the track for any considerable distance. When the trains come in from the branch lines, while using the main line at the station for discharging passengers, baggage, express, etc., it is necessary to protect them by the use of torpedoes from other trains likely to come in. The undisputed evidence shows that this has been the custom for many years, and that it is considered necessary by those who have been operating trains there. It is explained that, where a brakeman gets off to protect a train with a flag, it is necessary to use a torpedo for protection while he goes back to his train.

The track near the place where the plaintiff was injured was on a high dump, and is curved, so that it has always been found necessary to place a torpedo at that place. It is not a crossing; but there was testimony tending to show that people walk the track a good deal along there, and that children play on or about the track. On the occasion in question, the mixed train from St. Paul Branch came in, being due at 3:45 p. m., and when it came up the main line Raedles, a brakeman, got off and placed a torpedo on the track, as usual, leaving it there when he was called to his train as a signal to the other incoming trains.

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A train from the O. & C. Branch was due at 3:55, and another train on the main line was due from the south at 4:10 p. m. It was always considered necessary to put a torpedo on the track at that place to protect the St. Paul train from those trains while it was discharging passengers, baggage, etc., at the station and getting back to the switch. Raedles used a torpedo of approved pattern commonly in use. It had a lead strip attached to it, by which it was fastened to the rail so that it would be exploded by the wheels of a passing train. The boys saw Raedles put the torpedo on the track, and in a short time thereafter, about 15 minutes, the younger boy, Ellis, went over and picked it up and carried it to his brother, who exploded it, as already stated. The injury occurred in a very unusual and unexpected manner. Witnesses stated that torpedoes had been placed along there for 10 years or longer, and that an accident had never before happened on that account. The use of torpedoes in that way is shown to be customary in railroading, yet experienced railroad men testified that they had never heard of any one being injured as a result of that practice.

We need not spend any time in discussing the question of contributory negligence, or whether the negligence of defendant's servants, if there was any negligence, was the proximate cause of the injury. The question of negligence of the plaintiff in exploding the torpedo was properly submitted to the jury, and, considering the plaintiff's age and inexperience, we think the jury were justified in finding that he was not guilty of negligence. In the case of *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905, the court distinctly recognized the principle that negligence in unnecessarily leaving an explosive exposed so that children could have access to it would be the proximate cause if an injury resulting therefrom under circumstances similar to the facts of this case, citing *Harriman v. P. C. & St. L. R. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. The court there held that where the explosive was picked up by a child incapable of committing an act of negligence, and immediately carried it to his companion, who exploded it, the causal connection with the original act of negligence in leaving the explosive exposed was not broken by an intervening act of negligence, and that it was a result to be reasonably anticipated so as to make the injury the proximate result of the original act of negligence. The real question with which we must deal in this case is whether or not there is any evidence of negligence on the part of defendant's servants in leaving the torpedo on the track. Did they violate any duty which they owed to children who might come on the track?

Cases may readily be found where it is held to be negligence to leave explosives or other dangerous substances exposed so that injury may result therefrom. These are cases, however,

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where the method of using the substance is found to be negligent, or where there is negligence in unnecessarily leaving the substance exposed. We are not aware that any court has ever held that the necessary use in a careful manner of a dangerous substance in the operation of a lawful business constitutes negligence. There are many legitimate enterprises, the operation of which is necessarily dangerous. This is especially true of the operation of a railroad, which is necessarily a place of danger at all times. The locomotives, standing cars, hand cars, cattle guards, turntables, and numerous other things which could be mentioned are in a sense dangerous; yet they are necessary, and may be used without rendering the company liable for damages. It is only the negligent use, or use in a negligent manner, which is actionable when injury results.

Railroad companies have the right to the exclusive possession of their own premises, including the right of way, except at crossings or about stations where people have a right to go. The servants of the company are not required to anticipate the presence of trespassers except as to keeping a lookout in the operation of trains, which is now required by statute. Children may be trespassers the same as adults, and, except in the operation of trains where the lookout statute applies, servants of the company are not required to anticipate their presence where they have no right to be.

What is known as the doctrine of the "Turntable Cases" forms an exception to this rule; but that is where an owner permits to remain unguarded on his premises something dangerous which is attractive to children and from which an injury may reasonably be anticipated. The doctrine is stated by the court in *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216, as follows: "The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature, and exposed and open condition, of something thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs."

The doctrine of those cases proceeds entirely on the theory of negligence in using, or unnecessarily leaving exposed, the dangerous substance or machinery. In the *Cooper Case*, just referred to, the charge of negligence was that the defendant allowed to remain unguarded on its premises, which were frequented by children, a pool of hot water concealed by trash and bark, and the plaintiff, a child six years old, unwittingly walked into it and was scalded. When the case came back to this court on second appeal (70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724),

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Judge Riddick, delivering the opinion, said: "We hold that if the company owning the premises had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and if it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to a boy who by reason of its concealed nature walked into the pool of hot water and was burned."

The doctrine was first announced by the Supreme Court of the United States in *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745, a case where a child six years of age got his foot mashed while playing with a turntable on the premises of a railroad company. The court stated the facts and the rule applicable thereto as follows: "As it was in fact, on this occasion, so it was to be expected, that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some 8 or 10 pounds; but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that, if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff."

In *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254, a boy sued for damages received while he was attempting to swing on the side of a moving train in the railroad yards at Wynne, Ark. The boys were accustomed to steal rides on the trains at that place, and this was well known to the trainmen, who took no steps to prevent it. Sometimes they paid no attention to boys riding, and sometimes they made them get off. The doctrine just referred to was urged by able counsel, but the court rejected it. Chief Justice Cockrill, delivering the opinion of the court, said: "The appellant argues that a slow moving train is dangerous machinery, alluring to boys; and that it is therefore negligent of the company to fail to take precaution to keep them off such trains. That is the argument made to sus-

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tain a class of cases known as the 'Turntable Cases,' the leading one of which is *Railroad Co. v. Stout*, 17 Wall. 657 [21 L. Ed. 745]. * * * Whatever its merits may be, it has never been extended to such length as to control a case like this. * * * The youth of the person injured will sometimes excuse him from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence." The point of that case undoubtedly is that there must have been some act of negligence in the use of the dangerous substance or machinery, or in leaving it unguarded when not in use. Other cases illustrate the doctrine in the same way. *L. & N. Ry. Co. v. Hart*, 70 S. W. 830, 24 Ky. Law Rep. 1123; *P. C. & St. Louis Ry. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840; *Harriman v. Railway Co.*, supra; *Olson v. Investment Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884.

In the *Harriman Case*, above cited, which is strongly relied on by learned counsel for plaintiff, the trial court sustained a demurrer to the complaint, which alleged: That the servants of the railway company "wantonly placed said torpedoes upon the track of its road in an exposed place, where, if left undestroyed and unguarded, they would be likely to cause injury to others. That there was no reason for making use of said torpedoes at said time or place, nor was there any necessity of giving danger signals; but the same were used in mere wantonness and with a view that said train, on being moved forward, would pass over and explode the same. That said defendant so using said torpedoes in the manner aforesaid, so carelessly and negligently conducted itself in the management and care of its road, and management of its said train, that it negligently and carelessly failed to explode and destroy all of said torpedoes so placed on its track, and negligently and carelessly left upon its road, exposed and unexploded, and in plain view, one of said torpedoes at a point and place upon its road over which the inhabitants living along the line of said road, and other persons, were for years daily accustomed to travel and pass, and over which children were accustomed to go without hindrance; and all with the full knowledge of defendant. And that said defendant negligently, carelessly, and in willful disregard of the safety of those who the defendant well knew were in the daily habit of using said road as a pathway, permitted said unexploded torpedo to remain upon its road undestroyed and unguarded from the reach and observation of all passers-by." The Supreme Court held that the complaint stated a cause of action, and that the demurrer should have been overruled.

Now, applying the law announced in the foregoing cases to the facts of the present case, it is readily seen that no case of negligence has been made out against defendant. Its servants

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were using the torpedo in the customary way as a signal to expected trains. No negligence is shown in placing it there or in leaving it after the necessity for its use had ceased. The little boy Ellis picked up the torpedo a few minutes after it was placed there, and before the expected train came along to explode it. To hold that, under those circumstances, the servants of the company were guilty of negligence, would be to deny the company the right to use torpedoes at all. The undisputed evidence shows that it was necessary for the safety of trains to use them at the time and place named, and no negligence is shown in the method of using them, or that they were left unguarded after the necessity for their use ceased.

The case should not have been submitted to the jury. The judgment must therefore be reversed; and, as the facts were fully developed in the trial, no useful purpose will be served in remanding for a new trial.

Reversed and dismissed.

LOUISVILLE & I. R. CO. v. CALLAHAN et al.

(Court of Appeals of Kentucky, May 9, 1911.)

[136 S. W. Rep. 1018.]

Railroads—Stations—"Abandonment."—Though Ky. St. § 772 (Russell's St. § 5320), prohibits abandonment, without the Railroad Commission's consent, of a passenger station maintained for five years, reasonable changes may be made to afford better service to the public, and the removal of an interurban railroad's stopping point 376 feet to better the service was not an "abandonment" of the station within the statute.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Mary Callahan and others against the Louisville & Interurban Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions to dismiss the petition.

Clarence Dallman, for appellant.

Chatterton & Blitz, for appellees.

HOBSON, C. J. About 35 or 40 years ago a steam railroad was built, running from the city of Louisville to Prospect, about 12 miles. James Callahan, through whose land the road ran for some distance, donated the right of way, and a station was established on his land, which was maintained there as long as

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that company operated the road. About five years ago it sold out to appellant, who changed the road to an electric line, and has since operated electric cars over it. Appellant, at the request of R. L. Callahan, the son of James Callahan, moved the station 376 feet westward to Mocking Bird lane, and has since stopped its cars at Mocking Bird lane, and not at the point 376 feet east of it where the steam cars stopped. Appellees, who are the widow and some of the other children of James Callahan, brought this suit to require the appellant to stop its cars at the old stopping place 376 feet east of Mocking Bird lane. The circuit court adjudged them the relief sought, and the railway company appeals.

After appellant had moved the station 376 feet east of its former location, appellees applied to the Railroad Commission, who heard the parties and made an order refusing their consent to the abandonment of the old stopping place. Section 772, Ky. St. (Russell's St. § 5320), among other things, provides: "Any company that has established and maintained throughout the year, for five consecutive years, a passenger station at a point on its road, shall not abandon such station without the written consent of the Railroad Commission."

Appellant did not have the written consent of the Railroad Commission to abandon the old station, and if what it did was an abandonment of the station its conduct was wrongful. If, on the other hand, what it did was not an abandonment of the station, then it was unnecessary for appellant to have the consent of the Railroad Commission, and the fact that the Railroad Commission refused to give its consent is not material; for by the statute they are only given jurisdiction to determine when a station shall be abandoned. The case then comes to this, Was there an abandonment of the station when the stopping place was moved westward 376 feet? Mocking Bird lane is the westward boundary of appellees' land; the road runs through their property about one-half mile. Mocking Bird lane is a turnpike, and a number of suburban homes have been built upon it. A majority of the traveling public are better served by the station being at Mocking Bird lane, for the reason that persons can then reach the cars at the public highway. The chief objection which appellees have to the change appears to be due to the fact that to reach the new stopping place they have to cross a ditch on their land, and the bridge over this sometimes washes away.

The prime consideration in the location of stations is the public service. The corporation is created to serve the public, and how it may best serve the public is the first consideration in matters of this sort. In *Texas Pacific R. R. Co. v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94, it was held that a contract on the part of a railroad company to establish a station at a particular point is not one to keep it there forever, but is sub-

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ject to the general contingencies of business and the public interest, and that the company might move the station when this was required by the public service. The same view was taken by this court in the case of Board of Trustees of Elizabethtown v. C., O. & S. W. R. R. Co., 94 Ky. 377, 22 S. W. 609. In that case the town of Elizabethtown had subscribed \$75,000 to the stock of the Elizabethtown & Paducah Railroad Company, upon the condition that "the company build machine shops in Elizabethtown, and if it failed to do so the subscription to be void." The company built machine shops at Elizabethtown and maintained them until it failed. The property having been purchased at the decretal sale by a new company that took the road with the machine shops at Elizabethtown, this company moved them to Paducah, and the town sued for damages. After holding that the town had no lien on the road, this court, denying a recovery, said: "But it seems to us very clear that no obligation was ever imposed upon appellee, by either the act authorizing it to purchase the property, or by its contract of purchase, to continue indefinitely, or for any length of time, use of machine shops at Elizabethtown. According to the terms prescribed, there was a literal performance of the conditions upon which the subscription of stock was made on behalf of Elizabethtown when the machine shops were built there. And, in the absence of language showing, or from which it can be fairly implied, it was intended for the machine shops to permanently remain and be operated there, without regard to public convenience and necessity, certainly an action brought more than 15 years after the transaction should not be maintained against a bona fide purchaser of the property, either for damages or other relief, upon the ground the machine shops have been disused at that place."

In the case before us there was no contract between James Callahan and the railroad company that a station should be put on his land. The station was put, there, merely because it was the proper place for it under the conditions then existing. Appellees plant their whole claim to relief upon the ground that the station having been maintained there for over 30 years it cannot be abandoned; but, if a mere removal of the stopping point 376 feet is not an abandonment of the station, their action cannot be maintained. In Mississippi, where the statute is similar to ours, a railroad company moved its station in Vicksburg from one point to another in the city; the new point being more convenient to the public than the old one. The Railroad Commission made an order requiring the company to maintain the old station. The court, in *State v. Ala., etc., R. R. Co.*, 68 Miss. 653, 9 South. 469, held that the mere removal of the station from one point to another was not abandonment. It said:

"The mere site of the station house for passengers has been changed, or is threatened to be changed, but the change of the

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site of the station house for passengers from one spot to another in the same town, for reasons of convenience, or business necessity, or public good, is not the abolishment or disuse of the depot in such town. The legislative purpose was to prevent towns and communities being deprived of the uses and benefits of depots in their midst, after the same had been once established, at the pleasure or caprice of railroad companies. It needs no argument to demonstrate the distinction between abolishing a depot—wiping it out of existence—and merely changing its site in the same town, in order to render its existence more beneficial. We must not suppose the Legislature intended to clothe the Railroad Commission with the power to fix unalterably the sites of station houses in particular spots, in the absence of an express declaration to that effect; nor are we warranted, by any known rules of construction, in holding that railroads are forbidden to make convenient changes of sites for station houses in a particular community, because they are forbidden to abolish—wipe out of existence—or discontinue the use of a depot at all in such community. The proposed change of site only may be made, we think, when the public interest and the interests of the railroad company concur in demanding it, provided the new site selected be not inconvenient or inaccessible."

The same distinction was pointed out by the Supreme Court of Massachusetts in *Attorney General v. Eastern, etc., R. R. Co.*, 137 Mass. 45, and *Cunningham v. Railroad Co.*, 158 Mass. 104, 32 N. E. 959. See, also, *Chicago, etc., R. R. Co. v. People*, 222 Ill. 396, 78 N. E. 784. We think the distinction is a sound one. The purpose of locating a station is to serve the public in the locality. To move the stopping place of the cars three or four hundred feet the better to serve the public is not to abandon the station; but to improve it. To illustrate, if a city should be built about a railway station and streets should be run across the track, so that trains standing at the usual stopping place would obstruct travel on the streets, who would say that to move the stopping place 300 feet, to avoid obstructing the street, was an abandonment of the station? Or, if one railroad should be built across another at one of its stations, and to stop the cars at the established point would require them to be across the track of the other road while standing at the station, could it be maintained that a change of the stopping place three or four hundred feet, to avoid this danger to life, would be unwarranted under the statute, without the consent of the Railroad Commission? While railway stations may not be abandoned contrary to the statute, reasonable changes may be made in them for the better service of the public, and the removal of a stopping point 376 feet is not an abandonment of a station within the meaning of the statute.

Judgment reversed, and cause remanded to the circuit court, with directions to dismiss the petition.

MILLER, J., not sitting.

SEABOARD AIR LINE RY. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 25, 1911.)

[71 S. E. Rep. 39.]

Appeal and Error—Review—Matters of Evidence Considered—Pleadings.*—Where an application for an injunction is refused without stating any reason, the only question arising on appeal is whether, upon the complaint and its supporting affidavits, and upon the return and its supporting affidavits, there is a prima facie showing warranting an injunction.

Injunction—Right to Temporary Injunction.—A temporary injunction should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by the plaintiff.

Eminent Domain—Compensation—Statutory Provisions.—The condemnation statute is limited to the ascertainment of the amount of damages, and affords no method for determining the right to condemn.

Eminent Domain—Proceedings to Take Property and Assess Damages—Conditions Precedent.—A railroad company cannot lawfully condemn a crossing of the right of way of another, unless it appears that such crossing would not be an unreasonable hindrance of the right of way already dedicated within Civ. Code 1902, § 2195, and unless the consent of the Railroad Commission to such crossing is obtained, as provided by section 2179.

Eminent Domain—Remedies of Owner—Injunction—Stay until Determination of Right to Condemn.—An injunction to stay condemnation proceedings to assess damages for a proposed crossing by one railroad of the right of way of another should be granted where it is not shown that there has been a performance of a condition precedent to the plaintiff's right, imposed by the Railroad Commission.

Appeal from Common Pleas Circuit Court of Chesterfield County; J. W. De Vore, Judge.

Appeal by the Seaboard Air Line Railway, from an order refusing an injunction pendente lite, to restrain the Atlantic Coast Line Railroad Company from maintaining condemnation proceedings. Order reversed, and condemnation proceedings enjoined pendente lite.

See, also, 71 S. E. 34, 40.

Stevenson & Matheson and *Lyles & Lyles*, for appellant.

Geo. B. Elliott, Willcox & Willcox, and *W. P. Pollock*, for respondent.

*For the authorities in this series on the right to condemn property belonging to a railroad, see foot-note of *Louisiana, etc., Ry. Co. v. Louisiana Ry., etc., Co.* (La.), 35 R. R. R. 548, 58 Am. & Eng. R. Cas., N. S., 548.

Seaboard Air Line Ry. v. Atlantic Coast Line R. Co

JONES, C. J. This is an appeal from an order of Judge DeVore passed on November 11, 1910, refusing injunction pendente lite to restrain condemnation proceedings to assess damages for the proposed crossing of plaintiff's right of way by a spur track of the defendant at Front street, in the town of Cheraw, S. C.

[1] The order refused injunction without stating any reason; hence the only question properly arising is whether, upon the complaint and supporting affidavits, and upon the return and the supporting affidavits, there was a prima facie showing warranting injunction.

[2] The rule is well established that temporary injunction should be granted when it appears prima facie that such injunction is necessary to preserve the right asserted by the plaintiff. *Marion County Lumber Co. v. Tilghman Lumber Co.*, 75 S. C. 220, 55 S. E. 337.

[3] That the condemnation statute affords no machinery for determining the right to condemn and is limited to the ascertainment of the amount of damages has been frequently declared. *Georgia, etc., Ry. Co. v. Ridlehuber*, 38 S. C. 308, 17 S. E. 24; *Water Co. v. Nunamaker*, 73 S. C. 550, 53 S. E. 996.

It would be an anomaly to have a judgment fixing the amount of compensation to be awarded in condemnation proceedings in advance of a determination whether the right to condemn exists, upon which depends the duty to pay the compensative damages. Such a judgment presupposes the ascertainment of the right upon which it is based. Hence it is essential to stay proceedings, so that there be no such judgment until the right thereto has been established.

[4] Before a railroad company can lawfully condemn a crossing of the right of way of another, it must appear that such crossing would not be an unreasonable hindrance of the right of way already dedicated within section 2195, vol. 1, Civil Code 1902, and the consent of the Railroad Commission to make such crossing must be obtained, as provided in section 2179, Civil Code 1902, vol. 1.

Subject to review in a proper case, with the proper parties before the court, the question of hindrance, which involves also the question of public safety, must first be considered by the Railroad Commission as a preliminary of granting their consent to allow the crossing. If consent is granted upon certain conditions precedent, there is no consent until the performance of such conditions.

[5] In this case it appears from the proceedings and the undisputed facts existing at the time of the condemnation proceedings that the consent of the Railroad Commission to permit the crossing was on the condition that the crossing at grade should be protected by an interlocking switch, plans of which were to be first submitted to and approved by the Commission. There was no

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showing that the condition had been performed; in fact, it is not disputed that plans of such switch had not been approved by the Commission. We need not refer to the fact developed at the hearing of this appeal that the Railroad Commission has not only not approved any plan of an interlocking switch, but has actually determined that there shall be no crossing at grade at the point where the right of way is sought to be condemned.

The action of plaintiff to stay condemnation proceedings was brought in due time, before judgment in condemnation was rendered, and we find nothing in the facts which warrants a conclusion that plaintiff has waived, or is estopped to assert, the claim that no right to condemn exists. The situation was such that it was error to refuse to stay the condemnation proceedings.

The order appealed from is reversed, and the condemnation proceedings enjoined pendente lite.

* GRAHAM v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, May 9, 1911.)

[71 S. E. Rep. 235.]

New Trial—Excessive Recovery—Wrongful Conduct of Employee.—One thousand dollars recovery against a railroad company by a freight patron, grossly insulted and maliciously assaulted by a station agent, was not so excessive as to show passion or prejudice, entitling the railroad company to a new trial as a matter of right.

New Trial—Grounds—Absent Witnesses—Judicial Discretion.—It was not an abuse of discretion to refuse defendant a new trial, asked on account of absent testimony, where there was no motion for continuance on that ground.

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge.

Action by O. O. Graham against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucian W. McLemore, for appellant.

J. W. Ragsdale, for respondent.

JONES, C. J. The complaint in this case was based on the allegation that, on November 5, 1909, in Florence county at Coward's Station, on defendant's line, defendant, by its station agent, E. L. Smith, grossly insulted and abused plaintiff, and maliciously assaulted him with a pistol, while he was lawfully upon defend-

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ant's premises, for the purpose of obtaining freight and paying the charge due thereon. Verdict and judgment were rendered in favor of plaintiff for \$1,000.

Motion for a new trial was made on two grounds: (1) "That the verdict is so excessive as to show on its face that the jury were influenced by passion, or whim, or prejudice; (2) that the failure of defendant to have the benefit of the testimony of the witness S. C. Smith could not have been foreseen and guarded against, and without this testimony the defendant has not had a fair and impartial submission of its case to the jury." These grounds are renewed here by exceptions; all other exceptions being abandoned.

[1] We cannot say that the verdict was the result of passion, whim, or prejudice upon anything appearing in the record, or that there was abuse of discretion in refusing a new trial for excessive verdict. There was evidence tending to show that defendant's agent assaulted plaintiff with a deadly weapon, upon the station premises, while plaintiff was there dealing with the agent in reference to business within the scope of agent's employment. The verdict may be regarded as large; but, not being without support in the evidence, this court cannot interfere. *Bing v. Atlantic C. L. R. R. Co.*, 86 S. C. 529, 68 S. E. 645.

[2] It may have been unfortunate for the defendant that it went to trial without the testimony of the witness Smith, but that affords no ground for relief in this court. There was not even a motion for continuance, on the ground of the absence of the witness. There was certainly no abuse of discretion in refusing a new trial on this ground.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

SMITH *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, May 2, 1911.)

[71 S. E. Rep. 47.]

Carriers—Passengers—Wrongful Taking of Mileage Books—Liability.—Where a railway company had no right to forfeit a passenger's mileage book, taken up and retained by a conductor, the passenger could recover the value of the book, with interest from the date of the taking.

Appeal from Common Pleas Circuit Court of Edgefield County; R. C. Watts, Judge.

Action by H. A. Smith against the Southern Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Hammond & Nicholson, for appellant.

B. L. Abney and N. G. Evans, for respondent.

HYDRICK, J. The facts out of which this case arose are fully stated in the opinion in the case of *Bessie D. Smith v. Same Defendant*, 70 S. E. 1057, recently filed. This plaintiff seeks to recover damages for alleged abusive language of defendant's conductor to him on the occasion in question, and for taking up and refusing to return to him his mileage book. At the close of plaintiff's testimony, defendant moved for a nonsuit on two grounds: (1) Because there was no evidence upon which punitive damages could be awarded. (2) Because the evidence showed that plaintiff had violated the terms of his contract by using the coupons from his mileage book to purchase a ticket for his wife, and therefore, by the terms of the contract the mileage book was subject to forfeiture. The motion was granted.

A careful examination of the evidence discloses nothing in the language or conduct of the conductor toward this plaintiff which would warrant a verdict for punitive damages. There was, therefore, no error in granting the nonsuit on that cause of action. But the principles upon which the case of *Bessie D. Smith* was decided are conclusive of the proposition that, under the circumstances, the defendant did not have the right to forfeit plaintiff's mileage book. Therefore plaintiff should have been allowed to recover the value of his mileage book, with interest thereon from the date it was taken from him, and for that purpose the judgment is reversed, and the case remanded. Reversed.

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"Invitation" to take passage on train, what is included in the term. *Lawrence v. Kaul Lumber Co.* (Ala.), 141.

Person who obtains free passage on passenger train from conductor by means of fraud or misrepresentations, and with knowledge of want of authority on part of conductor to allow such free passage, is not lawful passenger without reward, within Cal. Civ. Code, § 2096. *Sessions v. Southern Pac. Co.* (Cal.), 781.

Persons getting upon platform of passenger train about 10 o'clock at night, attempting to ride to certain junction one mile distant, the fare for which was five cents, where they were not seen by conductor and did not offer to pay fare. *St. Louis, etc., R. Co. v. Sanderson* (Miss.), 193.

Persons riding on trains not intended for passengers, contrary to the carrier's rules, are trespassers, and even when riding by permission of the trainmen are bare licensees. *White v. Illinois Cent. R. Co.* (Miss.), 520.

Railroad employee being transported to work by his company. *St. Louis, etc., Ry. Co. v. Wiggam* (Ark.), 69.

Relation of carrier and passenger does not terminate until passenger has alighted from street car and has both feet squarely on the ground. *Denver City Tramway Co. v. Hills* (Colo.), 505.

Section hand was not a passenger in descending mountain on a side board fixed to the railroad track, such ride being a mere incident to his employment. *Kindellan v. Mt. Washington Ry. Co.* (N. H.), 430.

Status of person entering train of carrier who is not a common carrier of passengers, and has not expressly contracted to carry him in the particular case, as affected by fact that his presence is or is not known and acquiesced in by those in charge of train. *Lawrence v. Kaul Lumber Co.* (Ala.), 141.

Tie inspector of another railroad, who was, with consent of defendant railroad, on its train in order to examine certain ties bought by his employer. *St. Louis, etc., R. Co. v. Kitchen* (Ark.), 178.

To constitute one a passenger, it is not necessary that the carrier should be a common carrier, nor that the train or car should be used or adapted primarily for carrying passengers; and one may be a passenger, though he pay nothing for his carriage. *Lawrence v. Kaul Lumber Co.* (Ala.), 141.

Upon whatever terms common carrier of persons voluntarily receives and carries a person, the relation of common carrier

CARRIERS OF PASSENGERS—Continued.

and passenger exists. *Walther v. Southern Pac. Co. (Cal.)*, 466.

Voluntary waiver of all claim for compensation for carriage of a person does not take away the status of common carrier with respect to such person. *Walther v. Southern Pac. Co. (Cal.)*, 466.

CHILDREN.**Damages.**

\$5,000 was not excessive verdict, in action for personal injuries of 3½ year old boy. *Louisville & N. R. Co. v. Wilkins' Guardian (Ky.)*, 407.

Discovered Peril.

Engineer is negligent if he undertakes to run a rapidly moving train past young child dangerously near track. *Dempsey v. Norfolk & W. Ry. Co. (W. Va.)*, 260.

Engineer's duty upon discovering child of irresponsible age on track. *Dempsey v. Norfolk & W. Ry. Co. (W. Va.)*, 260.

Imputed Negligence.

Contributory negligence of parent in failing to give 3½ year old child proper medical treatment after receiving the injuries sued for will not be imputed to the child for the purpose of mitigating damages. *Louisville & N. R. Co. v. Wilkins' Guardian (Ky.)*, 407.

Lookouts.

Engineer is negligent, when his other duties do not demand attention and the situation permits a view, to fail to observe a young child by side of track and dangerously near it. *Dempsey v. Norfolk & W. Ry. Co. (W. Va.)*, 260.

In action for injury to 11 year old boy, caused by his exploding torpedo placed on defendant's track by its brakeman, the jury was justified in finding that plaintiff was not guilty of negligence, but that it was error to submit the question of defendant's negligence to the jury. *St. Louis, etc., R. Co. v. Williams (Ark.)*, 786.

Railroad's servant need not anticipate the presence of children where they have no right to be except where the railroad's premises are so attractive to children that injury may be reasonably anticipated from failure to guard them. *St. Louis & S. F. R. Co. v. Williams (Ark.)*, 786.

COMMON CARRIERS.

See CARRIERS; INTOXICATING LIQUORS.

Act of God.

Railroad company whose track was washed out by flood was not liable to shipper of live stock because it could not carry them to their destination. *St. Louis, etc., Ry. Co. v. Wood (Ark.)*, 542.

Assaults.

\$1,000 recovery against railroad by a freight patron, grossly insulted and maliciously assaulted by station agent, was not so excessive as to show passion or prejudice, entitling the railroad to new trial as matter of right. *Graham v. Atlantic C. L. R. Co. (S. Car.)*, 798.

COMMON CARRIERS—Continued.**Burden of Proof.**

Burden was on express company sued for death of young trout to show why it did not deliver the shipment in as good condition as that in which it was received, in absence of special contract limiting its duty. *Rick v. Wells Fargo Co. (Utah)*, 562.

Rule that a negative finding may be made when there is no evidence to sustain an affirmative issue did not apply to question whether carrier of live fish negligently cared for them; the burden to show care being on it. *Rick v. Wells Fargo Co. (Utah)*, 562.

Contributory Negligence.

Shipper's duty to notify carrier that live fish in question were afflicted with such latent infirmity as to require certain special attention, it was error to assume as matter of law that it was the. *Rick v. Wells Fargo Co. (Utah)*, 562.

Damages.

Special damages arising after carrier had opportunity to avoid further delay were recoverable, although it was not notified of the urgency of the shipment until after the shipping contract had been made. *Virginia-Carolina Peanut Co. v. Atlantic C. L. R. Co. (N. Car.)*, 573.

Degree of Care.

Common carrier of freight is an insurer against loss or injury from whatever cause, except only an act of God or the public enemy. *Sunderland Bros. Co. v. Chicago, etc., R. Co. (Neb.)*, 528.

That express company's employee used due care and diligence according to his best knowledge does not excuse liability for death of fish transported by it. *Rick v. Wells Fargo Co. (Utah)*, 562.

Finding that express company was not negligent in "transporting" live fish does not show that care was used in handling the shipment. *Rick v. Wells Fargo Co. (Utah)*, 562.

Freight Charges.

Evidence is insufficient to sustain that part of the judgment in question which is based on alleged excessive freight charges. *Sunderland Bros. Co. v. Chicago, etc., R. Co. (Neb.)*, 528.

Limiting Liability.

Shipping order and bill of lading constituted contract of transportation; but the carrier, limiting its liability in the bill of lading, must show by evidence outside of such instrument that the limitations were assented to by the shipper. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.

Where limitation of carrier's liability is knowingly assented to by shipper it will bind him, whether he signs any agreement or not; and whether any restriction has been so assented to is matter of proof. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.

Proximate Cause.

Needlessly delays shipment or negligently fails to protect it from known or threatened danger, and the goods are overtaken in transit and are damaged or destroyed by an act of God, liability of carrier where it. *Sunderland Bros. Co. v. Chicago, etc., R. Co. (Neb.)*, 528.

CONCURRENT NEGLIGENCE.

See ACCIDENTS ON TRACK; NEGLIGENCE.

CONNECTING CARRIERS.**Burden of Proof.**

Burden on terminal carrier to prove that it delivered the goods to consignee in same condition it received them, when is the. *Lowry v. Atlantic C. L. R. Co. (S. Car.)*, 254.
In action against terminal carrier for loss of and damage to goods, its negligence was question for jury. *Lowry v. Atlantic C. L. R. Co. (S. Car.)*, 254.

Liability beyond Own Line.

Acceptance by carrier of car load of freight for delivery beyond its own line constitutes a prima facie contract to carry and deliver to the point of destination. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.

Limiting Liability.

Facts in question raised natural inference that plaintiff knew conditions of defendant's bills of lading and assented to the limitations therein. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.
How carrier may limit to its own line. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.
Power of carrier to limit its liability to its own line. *Illinois Match Co. v. Chicago, etc., Ry. Co. (Ill.)*, 545.

CONSTITUTIONAL LAW.

See EMINENT DOMAIN; RAILROAD COMMISSIONS; RAILROADS; SPURS AND SIDE TRACKS.

Discrimination.

Tenn. Laws 1887, c. 208, forbidding any corporation, etc., to discharge any employee or threaten to do so for voting or not voting at any election, etc., is unconstitutional because of failure to include partnerships and individuals within scope of the statute. *State v. Nashville, etc., Ry. Co. (Tenn.)*, 12.
Tenn. Laws 1887, c. 208, forbidding any corporation, joint stock company, or association to discharge any employee or threaten to do so for voting at any election, etc., is invalid, as denying corporations equal protections of laws. *State v. Nashville, etc., Ry. Co. (Tenn.)*, 12.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS.

Burden of Proof.

Defense may be established by plaintiff's evidence. *St. Louis, etc., Ry. Co. v. Wiggam (Ark.)*, 69.

Emergencies.

Where person finds himself in dangerous position through negligence of another, without his own fault, and in attempting to extricate himself, not having time to deliberate, selects a more dangerous method, the law will not impute to him contributory negligence. *Shaffer v. Beaver Valley Traction Co. (Pa.)*, 426.

CORPORATIONS.

See RAILROADS.

CROSSINGS.

See DEATH BY WRONGFUL ACT; EMINENT DOMAIN; RIGHT OF WAY; STOCK, INJURIES TO; STREET RAILWAYS.

Contributory Negligence.

Contributory negligence in failing to look and listen for trains and failure to give statutory signals, there can be no recovery where there were both. *Beech v. Missouri, etc., Ry. Co.* (Kan.), 652.

Evidence showed that accident was caused by chauffeur's carelessness. *Chase v. New York Cent. R. Co.* (Mass.), 382.

Evidence showed that deceased took the risk in question, not to save his property, but his son from being struck by the train; and such fact relieved him from the charge of negligence as matter of law. *Michaels v. Chicago, etc., R. Co.* (Wis.), 750.

Question for jury whether driver of horses killed by train at crossing was guilty of contributory negligence in the manner he approached the crossing, and in his attempt to control the horses after they became frightened. *Morgan v. Iowa Cent. Ry. Co.* (Iowa), 404.

Question for jury whether traveler injured in collision with engine was guilty of contributory negligence. *Tietz v. Grand Trunk Ry. Co.* (Mich.), 657.

Discovered Peril.

Engineer is not required to stop train when he sees person approaching track. *Morton's Ex'r v. Southern Ry. Co.* (Va.), 758.

In action for loss of horse struck by car on electric railway, the evidence presented a question for the jury whether the motor-man could, in the exercise of reasonable care, have seen the animal in time to have stopped the car before reaching him. *Swisher v. Interurban Ry. Co.* (Iowa), 734.

Evidence.

Evidence that switchman was stationed at the crossing after the accident to plaintiff was inadmissible. *Felske v. Detroit United Ry.* (Mich.), 422.

Flagmen.

Railroad is not bound to station flagman at crossing of switch over street in small town. *Hammers v. Colorado, etc., R. Co.* (La.), 414.

Intersecting Railroads.

One steam railroad company over whose right of way another has secured the right to cross cannot enjoin the physical crossing pending appeal or final determination of the proceedings. *Vandalia R. Co. v. La Fayette & L. T. Co.* (Ind.), 59.

Last Clear Chance.

Application of doctrine in case of crossing accidents. *Morton's Ex'r v. Southern Ry. Co.* (Va.), 758.

Negligence of pedestrian struck by train does not relieve railroad from liability for her death, where after discovering her peril the trainmen could have avoided the accident by ordinary care. *Chesapeake & O. Ry. Co. v. Bank's Adm'r* (Ky.), 667.

Lookouts.

Evidence justified finding that decedent's peril could have been

CROSSINGS—Continued.

- discovered if the fireman had performed his duty of keeping a lookout; and that, after the discovery of such peril, the accident could have been avoided by the fireman and engineer exercising ordinary care. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.
- Duty of fireman to keep lookout when train was approaching street crossing was not diminished by the fact that the engine bell was ringing, or that the crossing gates were down. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.
- Failure of fireman to keep lookout when train was approaching crossing was actionable negligence. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.
- Failure of fireman to keep lookout when train was approaching street crossing could not be excused on the theory that he could not anticipate that pedestrian would step from a place of safety onto the track in front of a moving train, because it is such negligence trainmen must anticipate and provide against. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.
- Fireman's failure to keep lookout when train was approaching street crossing could not be excused on the ground that it was necessary for him to look back to see whether the train was clearing the station without injuring passengers, and to be ready to receive signals in case of danger, the train being equipped with a full crew. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.
- In action for death of pedestrian struck by train at street crossing, evidence supported finding that, if lookout had been kept by fireman, the accident could have been avoided. *Chesapeake & O. Ry. Co. v. Bank's Adm'r (Ky.)*, 667.

Negligence.

- Evidence of negligence of railroad in causing collision with automobile was insufficient to go to jury. *Chase v. New York Cent. R. Co. (Mass.)*, 382.

Obstructions.

- Boy injured by sudden starting of cars without warning while he was attempting to cross by way of car platform, liability of railroad where. *Crowley v. Pennsylvania R. Co. (Pa.)*, 649.
- Charter provision, requiring railroad to cause its road to be so constructed as not to impede traffic along a public road which its road crosses, is not limited to public roads existing when the railroad was constructed, but requires it to conform its grade to streets subsequently constructed across it. *Atlantic C. L. R. Co. v. City of Goldsboro (N. Car.)*, 642.
- N. Car. Revisal 1908, § 1097 (10), authorizing the Corporation Commission to require the raising or lowering by a railroad of its track at any crossing, and designating who shall pay for the same, does not deprive a city of the right to exercise its police power in that regard. *Atlantic C. L. R. Co. v. City of Goldsboro (N. Car.)*, 642.
- N. Car. Revisal, § 388, providing that no railroad shall be barred by limitations as to its right of way by occupation of it by another, does not apply where a city is merely contending for the right to require the railroad to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage of the city may not be impeded. *Atlantic C. L. R. Co. v. City of Goldsboro (N. Car.)*, 642.
- Question for jury whether it was negligence to obstruct highway with cars. *Crow v. Southern Ry. Co. (Ga.)*, 777.

CROSSINGS—Continued.**Proximate Cause.**

In action for death of horses struck by train at crossing, issue of proximate cause of the injury was for jury. *Morgan v. Iowa Cent. Ry. Co.* (Iowa), 404.

Question for jury whether death of plaintiff's daughter resulted from becoming wet and chilled while standing in the rain waiting for crossing to be cleared of cars, and was proximately caused by the blocking of the highway. *Crow v. Southern Ry. Co.* (Ga.), 777.

Where danger of driver of wagon at crossing was created by her own negligence, yet, if the engineer of the train which struck the wagon by due care could have prevented the accident, failure to exercise such care was sole proximate cause of the injury. *Cavanaugh v. Boston & M. R. R.* (N. H.), 398.

Where trainmen should anticipate a collision with traveler at crossing and could avoid it, their negligent failure to do so is the responsible cause of his injury, if at the time of their discovery of his peril the traveler could not save himself. *Cavanaugh v. Boston & M. R. R.* (N. H.), 398.

Signals.

Certain statutory provisions are made applicable to interurban railways by Acts 29th Iowa Gen. Assem. c. 81, § 2. *Swisher v. Interurban Ry. Co.* (Iowa), 734.

Electric cars approaching crossings, care required in giving signals from. *Central Kentucky Traction Co. v. Glass' Adm'r* (Ky.), 746.

Negative and positive evidence as to whether or not train signals were given, comparative weight of. *Morgan v. Iowa Cent. R. Co.* (Iowa), 404.

Person of ordinary prudence, operating electric car, may usually be expected to give such warning of its approach as will apprise persons exercising ordinary care for their own safety and in possession of their ordinary faculties of its approach. *Central Kentucky Traction Co. v. Glass' Adm'r* (Ky.), 495.

Private crossings, duty to give signals from electric cars approaching. *Central Kentucky Traction Co. v. Glass' Adm'r* (Ky.), 746.

Private crossing, duty to observe custom of giving electric car signals for. *Central Kentucky Traction Co. v. Glass' Adm'r* (Ky.), 746.

Private crossing in question, defendant owed common-law duty to signal approach of train to the. *Michaels v. Chicago, etc., R. Co.* (Wis.), 750.

Questions for jury where there was both negative and positive evidence as to whether there was a light on the engine in question and whether train signals were given. *Tietz v. Grand Trunk Ry. Co.* (Mich.), 657.

When witness says he was giving attention to the place and the possible dangers, his failure to hear a train bell or whistle at a railroad crossing is competent evidence that they were not sounded. *Chase v. New York Cent. R. Co.* (Mass.), 382.

Stop, Look, and Listen.

Care required of driver of automobile compared with that required of driver of horse-drawn vehicle. *Chase v. New York Cent. R. Co.* (Mass.), 382.

Duty of highway traveler to look again after passing obstruction to view. *Beech v. Missouri, etc., Ry. Co.* (Kan.), 652.

Question for jury whether traveler struck by train at crossing

CROSSINGS—Continued.

was negligent in looking and listening for trains. *Arkansas Cent. Ry. Co. v. Williams* (Ark.), 765.

Traveler struck by train at road crossing will be deemed to have seen and heard approaching train in time to have avoided injury, if he had opportunity to do so, though he testifies that, though he looked and listened, he did not see or hear train. *Arkansas Cent. Ry. Co. v. Williams* (Ark.), 765.

Unregistered Automobile.

Mass. St. 1906, c. 463, pt. 2, § 245, relating to liability of railroads for injuries to persons through neglect to give signals at crossings, is not available to person injured while riding in unregistered automobile. *Chase v. New York Cent. R. Co.* (Mass.), 382.

Persons who rode in unregistered automobile, when injured in collision with train at crossing, acted in violation of law, and their unlawful act contributed to their injury, within the express provisions of Mass. St. 1906, c. 463, pt. 2, § 245, precluding recovery under such circumstances. *Chase v. New York Cent. R. Co.* (Mass.), 382.

DAMAGES.

See CHILDREN; COMMON CARRIERS; EMINENT DOMAIN; PERSONAL INJURIES.

Punitive Damages.

Where railroad's employee in operating train displays reckless disregard for human life, exemplary damages will be awarded against the company for any resulting damages. *Ingram v. Louisiana, etc., R. Co.* (La.), 457.

Review.

Assessment of damages for personal injuries by jury on conflicting evidence will not be disturbed. *Louisville, etc., R. Co. v. Wilkins* (Ky.), 407.

DEATH BY WRONGFUL ACT.**Damages.**

\$5,000 was excessive verdict for death of man of 65, earning \$12.50 per week, in action to recover for his widow's sole benefit. *Swanson v. Union Stockyards Co.* (Neb.), 700.

Evidence.

Husband, in action for negligent death of wife, is competent to testify as to her condition when he saw her at the hospital after the accident and subsequently. *Chesapeake & O. Ry. Co. v. Banks* (Ky.), 667.

Independent of statute, father whose son was negligently killed could only recover for loss of services accruing between the injury and the death. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Pleading.

Complaint stated cause of action for wrongful death under the homicide act in question. *Louisville & N. R. Co. v. Chamblee* (Ala.), 292.

Father, suing as administrator for wrongful death of his son, may not combine in one count claim under "Death Act" of Michigan and under "Survival Act" of Michigan, and recover both classes of damages. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

DEATH BY WRONGFUL ACT—Continued.

Father suing for wrongful death of his son may not combine in one count claim for loss of son's services with his claim as administrator under the survival act of Michigan, and recover for both in same action. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Presumption of Due Care on Part of Deceased.

Overcome by special findings which show that if deceased had looked and listened for trains at crossing he must have seen the approaching train in time to avoid collision with it. *Beech v. Missouri, etc., Ry. Co.* (Kan.), 652.

Right of personal representatives of an employee to recover for injuries resulting in his death, in action against his employer under the homicide act in question must be determined by common-law rules, and not by the employers' liability act in question. *Louisville & N. R. Co. v. Chamblee* (Ala.), 292.

What Law Governs.

Where railroad engineer was killed in West Virginia, through the negligence of his company, jury could find for plaintiff, in action for his death, such damages as they might deem fair and just, not to exceed \$10,000, as authorized by Code W. Va., c. 103, §§ 5, 6. *Baltimore & O. R. Co. v. Taylor* (C. A.), 717.

EMINENT DOMAIN.

See LOGGING RAILROADS; RIGHT OF WAY; VENUE.

Abutters.

Court did not err in submitting to jury the issue of damage to plaintiff's property and to his trade from construction of railroad across city street about 200 feet from plaintiff's lot abutting thereon, and upon which he operated a store. *Powell v. Houston & T. C. R. Co.* (Tex.), 31.

In action for damages for obstructing street in raising grade of railroad crossing, it is not necessary that the obstruction should be in front of or near plaintiff's property. *Powell v. Houston & T. C. R. Co.* (Tex.), 31.

In action for damages for obstructing street in raising grade of railroad crossing, the test of the right to recover is what effect does the crossing and condition in which it was have upon the value of plaintiff's property, and upon the exercise of his right of ingress and egress. *Powell v. Houston & T. C. R. Co.* (Tex.), 31.

Whatever impairs the right of access and egress pertaining to lot abutting on street and causes depreciation in value of the lot constitutes damage within meaning of Texas Const., art. 1, § 17. *Powell v. Houston & T. C. R. Co.* (Tex.), 31.

Appeal.

Mere fact that commissioners, in laying out a railroad right of way, had allowed a certain item of damages, affords no evidence, on trial of appeal from their award, that such damages had been sustained. *Kansas City So. Ry. Co. v. Termier* (Kan.), 614.

Condemnation statute of South Carolina is limited to the ascertainment of the amount of damages, and affords no method for determining the right to condemn. *Seaboard A. L. Ry. v. Atlantic C. L. R. Co.* (S. Car.), 796.

Constitutional Law.

Ind. Act March 3, 1903, c. 59, § 1, authorizing electric railways

EMINENT DOMAIN—Continued.

to condemn right to cross steam roads, does not violate Ind. Const., art. 1, § 23, as granting special privileges not shared by steam railroads, they having substantially the same rights. *Vandalia R. Co. v. La Fayette & L. T. Co. (Ind.)*, 59.

Damages.

Except for provisions of Utah Const., art. 1, § 22, no action would lie against railroad for mere consequential injury to real property by jar of passing trains and smoke and cinders, where the road was carefully and properly built and operated. *O'Neill v. San Pedro, etc., R. Co. (Utah)*, 51.

Jury could with reasonable certainty ascertain the damage done to plaintiff's trade by raising grade of street crossing. *Powell v. Houston & T. C. R. Co. (Tex.)*, 31.

There was no error in admitting evidence that plaintiff had to pay higher rate for fire insurance because of proximity of defendant's locomotives. *O'Neill v. San Pedro, etc., R. Co. (Utah)*, 51.

Injunctions.

Right to enjoin condemnation proceedings to assess damages for proposed crossing by one railroad of right of way of another. *Seaboard A. L. Ry. v. Atlantic C. L. R. Co. (S. Car.)*, 796.

Peculiar Injury.

In action for damages for raising grade of railroad and obstructing crossing, that the injury was common to all other property fronting on the street will not bar plaintiff's right of recovery for loss peculiar to his property. *Powell v. Houston & T. C. R. Co. (Tex.)*, 31.

Property Subject.

Right of railroad to a crossing of the right of way of another railroad company. *Seaboard A. L. Ry. v. Atlantic C. L. R. Co. (S. Car.)*, 796.

Public Use.

Evidence showed that proposed industrial side track would be available to the public, etc., so that the use was a public one. *Bedford Quarries Co. v. Chicago, etc., Ry. Co. (Ind.)*, 24.

Question whether land condemned for railroad right of way is for a public use does not depend on the amount of business or the number of shippers, but on the right of the public to derive benefit from the proposed use. *Bedford Quarries Co. v. Chicago, etc., Ry. Co. (Ind.)*, 24.

That all the stock of a timber transportation company constructing a railroad under Rem. & Bal. Code, §§ 7106-7109, is held by a timber company or its stockholders, and that such company is the owner of the largest part of the timber it will be enabled to transport to market by the building of the road, effect of fact. *Clark v. Superior Court (Wash.)*, 45.

Right to Exercise Power.

Landowner cannot object to condemnation of land on the ground that the company has not yet acquired intervening property needed to connect the proposed switch with its main line, it having by the instrument of appropriation pledged that the switch would be connected with the main line and used for the public service. *Bedford Quarries Co. v. Chicago, etc., Ry. Co. (Ind.)*, 24.

EMINENT DOMAIN—Continued.

Right to exercise power of eminent domain or to delegate it and to determine extent of, and conditions upon its use, lies very largely, if not entirely, in the legislative discretion. *Vandalia R. Co. v. La Fayette & L. T. Co. (Ind.)*, 59.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS; INTERSTATE COMMERCE.

Assumption of Risk.

Under Ill. Laws 1905, p. 350, § 2, a switchman cannot be held to have assumed the risk of injury from going between cars not provided with automatic couplers, in performance of his duties, if he was free from negligence in other respects. *Luken v. Lake Shore & M. S. Ry. Co. (Ill.)*, 237.

Cars Used in Interstate Commerce.

Freight car loaded with interstate freight, and placed on side track in railway yard at destination to await simple repairs to automatic couplers, is used in interstate commerce within meaning of safety appliance act in question. *Delk v. St. Louis, etc., R. Co. (U. S.)*, 589.

Compliance with Acts.

Absolute duty to comply with safety act of March 2, 1893, is not discharged by properly equipping cars with automatic couplers, and using due diligence to keep them in good working order. *Delk v. St. Louis, etc., R. Co. (U. S.)*, 589.

Contributory Negligence.

Benefit of provisions of safety-appliance act of March 2, 1893, § 8, was not refused by holding as matter of law, that brakeman, in attempting to couple cars in certain way, was guilty of contributory negligence, defeating any recovery. *Schlemmer v. Buffalo R. & P. R. Co. (U. S.)*, 705.

On part of employee was a defense to action founded on safety-appliance act of March 2, 1893, although by § 8 of that act assumption of risk was expressly excluded. *Schlemmer v. Buffalo R. & P. R. Co. (U. S.)*, 705.

Federal automatic coupler act is not repugnant to Ill. Laws 1905, p. 350. *Luken v. Lake Shore & M. S. Ry. Co. (Ill.)*, 237.

"Frog," within certain statute requiring every railroad company to block the frogs on its tracks, what constitutes a. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.

Ill. Laws 1905, p. 250, § 2, providing for automatic couplers on cars, applies to empty as well as to loaded cars. *Luken v. Lake Shore & M. S. Ry. Co. (Ill.)*, 237.

Under Ill. Laws 1905, p. 350, § 2, it is the absolute duty of a railroad to equip its cars with automatic couplers, and a servant injured in consequence of failure to comply with the statute may recover irrespective of the question of negligence of his employer. *Luken v. Lake Shore & M. S. Ry. Co. (Ill.)*, 237.

EVIDENCE.

See AGENCY; CARRIERS; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT.

Speed.

One on a train at time of its derailment may testify that it was running very fast. *Parker v. Boston & M. R. R. (Vt.)*, 153.

FEDERAL JURISDICTION.

See INTOXICATING LIQUORS; REMOVAL OF CAUSE.

Removal of Cause.

To federal court, where petition, in action in state court brought by resident against foreign railroad corporation, and its resident servants for the negligent death of a person struck by a train at street crossing in the state, states a cause of action against all defendants. *Chesapeake & O. Ry. Co. v. Banks' Adm'r* (Ky.), 667.

FELLOW SERVANTS.

See EMPLOYER'S LIABILITY ACTS; MASTER AND SERVANT.

Different Department Limitation.

Statement of doctrine. *Nocita v. Omaha, etc., Ry. Co.* (Neb.), 440.

Pleading.

That employee was injured by negligent act or omission of fellow servant need not be specially pleaded by employer in order to rely thereon as a defense. *Louisville & N. R. Co. v. Chamblee* (Ala.), 292.

Vice Principals.

Under Batt's Ann. Civ. St. art. 4560b, an assistant foreman of railway bridge gang was not vice principal where he merely led in the work under the foreman's direction. *Missouri, etc., Ry. Co. v. Day* (Tex.), 125.

When master knows that negligence of one set of employees has imperiled fellow employee, he must adopt reasonable means to secure compliance with the rules, proper performance of the work, and removal of the danger. *Henry v. Hudson & M. R. Co.* (N. Y.), 453.

Who Are.

Engineer killed through failure of track foreman to keep road-bed in proper condition. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Relation depends on whether negligent servant was engaged in performing nonassignable duty of the master or the work of an ordinary servant. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Telegraph operator and engineer. *Rogers v. Pere Marquette R. Co.* (Mich.), 455.

FIRES SET BY LOCOMOTIVES.**Evidence.**

Evidence that coal used in defendant's locomotives burned slowly and retained fire for considerable time was relevant and material. *Abbott v. Chicago, B. & Q. R. Co.* (Neb.), 742.

That about the time of the injury sued for sparks and burning coals were frequently discharged from defendant's engines while passing plaintiff's property. *Abbott v. Chicago, B. & Q. R. Co.* (Neb.), 742.

That other fires were set by other engines, though the particular locomotive was identified. *Asplund v. Great Northern Ry. Co.* (Wash.), 740.

Origin of Fire.

May be proved by circumstantial evidence. *Abbott v. Chicago, B. & Q. R. Co.* (Neb.), 742.

FIRES SET BY LOCOMOTIVES—Continued.

Question for jury whether fire in question was negligently set by defendant's locomotive. *Asplund v. Great Northern Ry. Co.* (Wash.), 740.

Warrant inference of fact that fire in question was emitted from defendant's locomotive, what circumstantial evidence will. *Lemann Co. v. Texas & P. Ry. Co.* (La.), 615.

FOREIGN CORPORATIONS.

See PROCESS.

HOSPITALS.

See MASTER AND SERVANT.

HUSBAND AND WIFE.

See DEATH BY WRONGFUL ACT.

IMPUTED NEGLIGENCE.

See CHILDREN.

Negligence of driver of buggy was not imputable to person riding with him. *Flynn v. Chicago City Ry. Co.* (Ill.), 627.

INJUNCTIONS.

See CROSSINGS.

INTERSTATE COMMERCE.

See CARRIERS OF PASSENGERS; EMPLOYERS' LIABILITY ACTS.

Rates.

Certain rule for determining reasonableness of freight rates was not applicable to a railroad built and operated essentially for interstate purposes, and where the intrastate business was merely incidental and too inconsiderable to make it feasible to fix a reasonable maxim rate on the basis of comparative values. *Washington So. Ry. Co. v. State Corp. Comm.* (Va.), 552.

State Regulation.

Carrier which had adopted lower schedules of charges for intrastate and interstate service than the rate allowed by State Corporation Commission for intrastate business, could not object to the rates fixed by the commission as burdening interstate commerce. *Washington So. Ry. Co. v. State Corp. Comm.* (Va.), 552.

Congress may enact laws requiring all railroads to equip their cars with safety appliances, but the exercise of that power does not preclude state from making similar regulations as to roads engaged in intrastate commerce. *Luken v. Lake Shore & M. S. Ry. Co.* (Ill.), 237.

Duty imposed upon railroad companies to make written application to the Railroad Commissioners for their consent before discontinuing any regular intrastate train carrying passengers is not an unlawful burden upon or regulation of interstate commerce. *Railroad Comm'rs v. Atlantic C. L. R. Co.* (Fla.), 247.

Order of railroad Commissioners, requiring railroad to lay spur track at certain point, was not regulation of or interference with interstate commerce, but proper exercise of police power of the state. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Power of state courts to enjoin interstate carriers from receiv-

INTERSTATE COMMERCE—Continued.

ing from points without the state shipments of intoxicating liquors for transportation to and delivery to consignees within the state, "to persons who they well know, * * *, intended to use said liquor in violation of the laws of the state." Gulf, etc., Ry. Co. v. Caldwell (Okla.), 535.

That railroad may be engaged in both intrastate and interstate commerce does not prevent the state from adopting such regulations as it may deem proper to provide for the intrastate commerce. Luken v. Lake Shore & M. S. Ry. Co. (Ill.), 237.

What Constitutes.

Character of the traffic as intrastate or interstate in which car is being used at time of injury to car coupler, is to be determined from proof as to the points between which the car was being moved at the time, irrespective of whether the road was an interstate road or whether the car was sometimes used in interstate traffic. Luken v. Lake Shore & M. S. Ry. Co. (Ill.), 237.

Evidence showed that car in question was being used in intrastate commerce. Luken v. Lake Shore & M. S. Ry. Co. (Ill.), 237.

If the places for which and to which passengers and property are carried are within the state, the commerce is domestic, and subject to state control. Luken v. Lake Shore & M. S. Ry. Co. (Ill.), 237.

INTOXICATING LIQUORS.

See INTERSTATE COMMERCE.

Jurisdiction.

Federal Supreme Court cannot take original jurisdiction of suit by state against persons or corporations, where such suit is, in its essential character, one to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors. Oklahoma v. Gulf, etc., R. Co. (U. S.), 37.

State may not invoke original jurisdiction of Federal Supreme Court by suit on its behalf against persons or corporations of other states, where primary purpose of the suit is to protect its citizens generally against violations of its laws by such corporations or persons. Oklahoma v. Gulf, etc., R. Co. (U. S.), 37.

JUDICIAL NOTICE.

Supreme Court judicially knows what constitutes a "mixed or accommodation train." White v. Illinois Cent. R. Co. (Miss.), 520.

LAST CLEAR CHANCE.

See ACCIDENTS ON TRACK; NEGLIGENCE.

LEASES AND RUNNING POWERS.

See REMOVAL OF CAUSE.

LICENSEES.

See CARRIERS OF PASSENGERS; TRESPASSERS.

Contributory Negligence.

Engineer of railroad company who, while engaged in transferring cars in the yards of another company, does all that common prudence and the rules under which he is operating

LICENSEES—Continued.

his engine requires, must continue to exercise ordinary care for his own safety. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

Question for jury whether engineer injured while in yards of another company was guilty of contributory negligence in leaving cab of engine and in failing to keep proper lookout for his own safety and to observe rules designed to prevent collisions. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

What is ordinary care for an engineer of a railroad company while at work in transferring cars in the yards of another company is generally for the jury. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

Where two railroads adopted for their mutual benefit reasonable rules for the transfer of cars from the yards of either to the other, and an engineer of one company, while operating his engine in the yards of the other, is injured in a collision of trains resulting from his disobedience of such rules, he cannot recover. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

Where violation of rule of railroad companies, adopted for their mutual benefit, for transfer of cars from the yards of either to the other, has been tacitly sanctioned, a violation by an employee at a particular time was not negligence per se, so as to prevent recovery from one of the roads for injury to employee of the other road resulting from collision. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

Rules.

Where two railroad companies adopted rules for their mutual benefit for the transfer of cars from the yards of either to the other, the employees of the companies must run their cars in the yards with such diligence as to speed and lookout as is reasonably adequate to prevent collisions. *Gilbourne v. Oregon S. L. R. Co. (Utah)*, 87.

Who Are.

Mere acquiescence by railroad company in use of its tracks by trespassers, effect of. *Baltimore & O. R. Co. v. Welch (Md.)*, 617.

LOGGING RAILROADS.

See EMINENT DOMAIN.

Companies for the construction and operation of logging roads and water courses, for the incorporation of which Wash. Laws 1905, c. 82, § 1, provides, are public service corporations, and such act is not unconstitutional as conferring power of eminent domain for purpose not public in its nature. *Clark v. Superior Court (Wash.)*, 45.

MASTER AND SERVANT.

See AGENCY; CARRIERS OF PASSENGERS; COMMON CARRIERS; CONSTITUTIONAL LAW; DAMAGES; DEATH BY WRONGFUL ACT; EMPLOYER'S LIABILITY ACTS; FELLOW SERVANTS; LICENSEES.

Act of God and contributory negligence as defenses in action for death of railroad engineer by collapse of fill in roadbed owing to high water. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.

Appliances.

In action for injury to brakeman caused by hand-hold on car giving way, it was question for jury whether the defect should

MASTER AND SERVANT—Continued.

- have been discovered by the railroad by diligent inspection. *St. Louis, etc., Ry. Co. v. Webster (Ark.)*, 687.
- Right of master to rely on external appearances when inspecting appliances. *St. Louis, etc., Ry. Co. v. Webster (Ark.)*, 687.
- Since plaintiff was familiar with the danger attending the use of slide boards attached to track for descending a mountain, his railroad company was not negligent in permitting them to be used by employees, so as to be liable for plaintiff's injuries. *Kindellan v. Mt. Washington Ry. Co. (N. H.)*, 430.
- Where employee was fully informed as to the dangers of using a certain appliance in his work, the employer was not negligent in permitting him to use it. *Kindellan v. Mt. Washington Ry. Co. (N. H.)*, 430.

Assaults.

- Employer is liable for injury to employee resulting from an assault upon the latter by a dangerous, drunken, and desperate employee, in doing master's work, the latter's reputation being such that the employer was chargeable with notice of his character. *Missouri, etc., Ry. Co. v. Day (Tex.)*, 125.
- Employer would be liable for death of an employee whether it was caused solely by the wrongful assault of another employee, or whether such assault concurred with the effect of a surgical operation. *Louisville & N. R. Co. v. Chamblee (Ala.)*, 292.
- In action against railroad for assault by one employee upon another, evidence showed that company was negligent in employing and retaining the employee committing the assault. *Missouri, etc., Ry. Co. v. Day (Tex.)*, 125.

Assumption of Risk.

- At common law employee assumed risks of injury from negligence of fellow servant. *Louisville & N. R. Co. v. Chamblee (Ala.)*, 292.
- Burden of proving assumed risk, and that deceased had knowledge of the extraordinary danger, was on railroad company in action for death of its engineer by collapse of portion of road-bed. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.
- Dangers incident to riding down mountain on side board fixed to track was assumed by section hand. *Kindellan v. Mt. Washington Ry. Co. (N. H.)*, 430.
- Engineer killed by collapse of fill while operating train over it at night. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.
- Railroad workman assumes risk of injury resulting from maintenance of track on steep grade. *Fletcher v. Freeman-Smith Lumber Co. (Ark.)*, 137.

Contributory Negligence.

- Burden of proving contributory negligence was on railroad company, in action for death of engineer by reason of defect in track. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.
- Care required of brakeman in inspecting appliances. *St. Louis, etc., Ry. Co. v. Webster (Ark.)*, 687.
- Care required of trainmen, for their own safety, in inspecting appliances, as affected by rule of railroad requiring them to make such inspection. *St. Louis, etc., Ry. Co. v. Webster (Ark.)*, 687.
- Degree of care required of employee while being transported to work on hand car. *St. Louis, etc., Ry. Co. v. Wiggam (Ark.)*, 69.

MASTER AND SERVANT—Continued.

In action for injuries sustained by switch tender while boarding moving engine, evidence supported finding that he was not negligent in failing to discover that engineer had disregarded signal to slow down until engine was so close as to confuse him, nor in boarding engine under the circumstances. *St. Louis, etc., Ry. Co. v. Funk* (Ark.), 120.

Instruction on contributory negligence of brakeman in choosing more dangerous method of coupling cars was erroneous as making him the insurer of his own safety. *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 137.

Not negligence per se for brakeman to violate rule of his company forbidding employees to ride on pilots of engines, when defendant's negligence creates an emergency, and renders disobedience of the rule necessary to discharge of his duties. *Pounds v. Chicago Great Western Ry. Co.* (Minn.), 437.

Question for jury whether brakeman was guilty of contributory negligence in attempting to couple moving cars. *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 137.

Question for jury whether engineer violated his orders to "run slow" over the fill in question. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Question for jury whether street car conductor, injured by coming in contact with cross-wires supporting a trolley wire while holding broken trolley pole in place, was guilty of contributory negligence. *Pike v. Cedar Rapids, etc., Ry. Co.* (Iowa), 445.

Question for jury whether switch tender was guilty of contributory negligence in standing on track in front of approaching engine in order to mount it, instead of standing on one side of track and mounting gangway between engine and tender. *St. Louis, etc., Ry. Co. v. Funk* (Ark.), 120.

Railroad is not released from its liability for negligence in so improperly loading a car that it causes death of brakeman who undertakes to couple it by any supposed or alleged contributory negligence on part of the brakeman in going between the cars for purpose of aiding the "automatic coupler" in doing the work, the railroad having encouraged such practice under such circumstances. *Blackburn v. Louisiana Ry. & N. Co.* (La.), 75.

Railroad, upon whose superior intelligence and knowledge a brakeman has the right to rely, and not the brakeman, should be liable for consequences to the latter of going between cars to aid "automatic coupler," where it has encouraged and expected him to do so. *Blackburn v. Louisville Ry. & N. Co.* (La.), 75.

Riding on front end of hand car. *St. Louis, etc., Ry. Co. v. Wiggam* (Ark.), 69.

Right of engineer to presume that his company had performed its duty of maintaining its tracks in a reasonably safe condition. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Section hand on steam railroad must look out for passing trains, and such rule applies in freight yards. *Regan v. Boston & M. R. R.* (Mass.), 451.

Section hand's use of defective bar to pry against a rail without any examination of the bar, in view of the circumstances, amounted to such negligence as to preclude recovery for his injuries resulting from the bar slipping. *Ringer v. St. Louis, etc., R. Co.* (Kan.), 712.

Servant cannot justify disobedience of rules of master by proving them unnecessary, or that he adopted another measure equally safe. *Gilbourne v. Oregon S. L. R. Co.* (Utah), 87.

MASTER AND SERVANT—Continued.

Switch tender, whose duty it is to board moving engine, may rely on performance by engineer of his duty to reduce speed on signal, and, where he discovers failure of engineer to do so, he is confronted with emergency calling for exercise of judgment. *St. Louis, etc., Ry. Co. v. Funk* (Ark.), 120.

Trackman's right to rely upon his foreman's custom to watch and warn him of approaching cars. *Swanson v. Union Stockyards Co.* (Neb.), 700.

Violation of master's rules. *Gilbourne v. Oregon S. L. R. Co.* (Utah), 87.

Where section foreman, while repairing track in yard, was told by conductor of a shifting crew in the yard that no more cars would be sent down on any track so as to interfere with such repair work, such foreman was relieved of the duty of watching for cars coming from such conductor's engine. *Regan v. Boston & M. R. R.* (Mass.), 451.

Degree of Care.

Due employee while being transported to work by his railroad company. *St. Louis, etc., Ry. Co. v. Wiggam* (Ark.), 69.

Employing Servants.

Proof of general bad reputation of an employee may charge his employer with notice of his unfitness. *Missouri, etc., Ry. Co. v. Day* (Tex.), 125.

Question for jury whether railroad was negligent in employing and retaining employee who assaulted another. *Missouri, etc., Ry. Co. v. Day* (Tex.), 125.

Railroad must use ordinary care to inform itself of character and efficiency of its employees. *Missouri, etc., Ry. Co. v. Day* (Tex.), 125.

Failure to block the guard rail was not actionable negligence where brakeman was injured by stumbling over end of guard rail. *Siglin v. Chicago & N. W. Ry. Co.* (Iowa.), 682.

Foreign Cars.

Railroad's duty, as master, to inspect foreign cars. *St. Louis, etc., Ry. Co. v. Webster* (Ark.), 687.

Joint Liability.

Action against railroad and its conductor for wrongful killing of person by conductor is both joint and several, and, though both may be equally liable, the liabilities are based on different legal principles, and verdict for plaintiff against railroad, and against plaintiff in favor of the conductor, presents no ground for reversal of the judgment against the railroad. *St. Louis, etc., R. Co. v. Sanderson* (Miss.), 193.

Lookouts.

In action for injury to brakeman while coupling cars, it was a jury question whether engineer was negligent in failing to discover brakeman's signal and stop engine after latter was imperiled. *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 137.

Statutory duty to keep lookout on trains does not extend to coemployees operating a train. *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 137.

Presumptions.

As between coemployees operating same train there is no presumption of negligence affecting railroad's liability for injury

MASTER AND SERVANT—Continued.

to one of them. *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 137.

Presumption that the slat was placed there by agency of the railroad company where its brakeman was injured while standing at a switch by being caught by a slat projecting from platform of passenger car. *Siglin v. Chicago & N. W. Ry. Co.* (Iowa), 682.

Proximate Cause.

Evidence sustained verdict that defendant railroad's negligence was proximate cause of its employee's injury. *Pounds v. Chicago Great Western Ry. Co.* (Minn.), 437.

Railroad was negligent in furnishing to brakeman to be coupled a car so loaded with telegraph poles that his head was crushed by one of them while he was between cars. *Blackburn v. Louisville Ry. & N. Co.* (La.), 75.

Relief Department.

Railroad was mere trustee to administer hospital fund in question for benefit of its employees, and was responsible only for ordinary and reasonable care in selection of competent physicians and attendants, and was not liable for negligence or malpractice of physicians employed by its hospital department. *Arkansas M. R. Co. v. Pearson* (Ark.), 100.

Roadbed and Tracks.

Degree of care required of railroad to make and maintain its roadbed in safe condition for use of trainmen in operating trains over it. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Liability of railroad on account of failure to maintain its tracks in a reasonably safe condition for trainmen operating trains over them. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Negligence of company was question for jury, in action for death of engineer by collapse of part of roadbed as he was operating train over it at night. *Baltimore & O. R. Co. v. Taylor* (C. C. A.), 717.

Rules.

Competent to prove custom of employees at variance with a rule of the employer to show a waiver thereof by the employer acquiescing in the acts of the employees. *Pike v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 445.

Master's duty to promulgate rules, which, if observed by his servants, will afford them reasonable protection from injury. *Gilbourne v. Oregon Short Line R. Co.* (Utah), 87.

Trainman is not bound by rule or custom not brought to his attention, and is not presumed to know of a rule not promulgated, or of a custom not shown to have existed for some time. *St. Louis, etc., Ry. Co. v. Webster* (Ark.), 687.

Where two railroad companies adopted rules for the transfer of cars from the yards of either to the other, and a servant of one of the companies violated the rules while transferring cars, and thereby caused a collision, such violation could be taken advantage of as a defense by the other company. *Gilbourne v. Oregon S. L. R. Co.* (Utah), 87.

Scope of Employment.

Evidence, in action for injuries to street car conductor coming in contact with overhead wires while on top of car holding broken trolley pole in an attempt to ride the car to the barns,

MASTER AND SERVANT—Continued.

- justified a finding that he was acting within scope of his employment. *Pike v. Cedar Rapids, etc., Ry. Co. (Iowa)*, 445.
- In action for death resulting from assault by defendant's employee, previous acts of such employee in his capacity as night watchman, in which he acted when assaulting deceased, which were reasonably related in point of time to assault in question, were admissible upon issue of scope of his authority. *Louisville & N. R. Co. v. Chamblee (Ala.)*, 292.
- Spiker is railroad workman whose duty it is to drive spikes into cross-ties. *Nocita v. Omaha, etc., Ry. Co. (Neb.)*, 440.

Structures or Objects Near Track.

- Actionable negligence in location of track and guard rail, with reference to the pole, was not shown where passenger brakeman was injured by being thrown against viaduct pole near track used only for turning trains on a Y in railroad yards. *Siglin v. Chicago & N. W. Ry. Co. (Iowa)*, 682.
- Negligence for street railway to maintain cross-wires for support of its trolley pole about sixteen feet from the surface while a city ordinance requires that the cross-wires shall not be less than eighteen feet from the surface, toward its employee injured thereby. *Pike v. Cedar Rapids & M. C. Ry. Co. (Iowa)*, 445.

Warn and Instruct.

- As matter of law, there was no actionable negligence for failure to instruct injured brakeman as to proper manner of boarding moving train, he having represented that he was familiar with railroading. *Wiggins v. Seaboard A. L. Ry. Co. (N. Car.)*, 65.
- Engineer's telegraphic order informing him that the fill in road-bed was settling and to "run slow" was not such warning of the danger as to charge him with notice of the dangerous condition of the track. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.
- Facts in question justified finding that railroad in exercise of ordinary care should have kept watchman at point in question day and night in order to observe and record any change in the fill and notify trainmen approaching the same of its condition. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.
- Liability of railroad for injury to trackman resulting from failure of his foreman to warn him that cars are being kicked down the track upon which he is working. *Swanson v. Union Stockyards Co. (Neb.)*, 700.
- One entering into contract of employment thereby represents that he knows his duties and how to perform them. *Wiggins v. Seaboard A. L. Ry. Co. (N. Car.)*, 65.

Who Are Employees.

- Complaint sufficiently alleged that person in charge of street car was defendant's servant, so as to make applicable the rule of respondeat superior. *Flaherty v. Butte Elec. Ry. Co. (Mont.)*, 110.
- Defendant railroad, under the pleadings, could not insist that plaintiff at time of accident was mere employee of independent contractor employed by railroad. *St. Louis, etc., Ry. Co. v. Wiggam (Ark.)*, 69.
- It is not always essential that employee should be engaged in performing specific duties, in order to make applicable the rules of law applying to determine his rights and his employer's liabilities where he is injured while actually engaged in performance of his duties. *Louisville & M. R. Co. v. Chamblee (Ala.)*, 292.

MASTER AND SERVANT—Continued.

Question for jury whether or not employee was engaged in the service when injured. *Louisville & N. R. Co. v. Chamblee* (Ala.), 292.

That street car or other vehicle, by negligent management of which plaintiff was injured, was in charge of certain person when he was injured is prima facie evidence that such person was servant of its owner. *Flaherty v. Butte Elec. Ry. Co.* (Mont.), 110.

Where employee when injured was upon his employers' premises at an unreasonably early hour for his actual work or for preparation to begin his actual duties, it was for jury to determine whether the relation of master and servant, and hence that of fellow servant with night watchman, did not exist when he was injured. *Louisville & N. R. Co. v. Chamblee* (Ala.), 292.

Work Place.

Master is liable for his employees' conduct in failing to maintain safe place where work is to be done, but his liability is much more limited for defects created in prosecuting the work. *Henry v. Hudson & M. R. Co.* (N. Y.), 453.

Rule that master must provide safe place to work for his employees does not apply where the prosecution of the work makes the work place, as in constructing tunnel. *Henry v. Hudson & M. R. Co.* (N. Y.), 453.

MEDICAL AID.

See AGENCY.

MEDICAL SERVICES.

See RAILROADS.

MONOPOLIES.

See RAILROADS.

MUNICIPAL CORPORATIONS.

See STREET RAILWAY.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; IMPUTED NEGLIGENCE; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

Burden of Proof.

Plaintiff must show extent of injury and resulting damages attributable to defendant's negligent acts. *Knowlton v. Chicago & N. W. Ry. Co.* (Minn.), 571.

Concurring Causes.

If the evidence shows only that three concurring causes produced an aggregate loss, and it appears that defendant was not responsible for one cause producing a substantial part of the loss, the jury cannot arbitrarily apportion a part of the damages to the causes for which defendant is responsible. *Knowlton v. Chicago & N. W. Ry. Co.* (Minn.), 571.

Degree of Care.

Railroad companies are held to the greatest care and diligence both in regard to the machinery and equipment of their roads

NEGLIGENCE—Continued.

and the acts of their officers and agents. *Ingram v. Louisiana, etc., R. Co. (La.)*, 457.

It is for the court to say what act of omission is evidence of negligence, or not, but generally it is for the jury to say whether the evidence establishes negligence. *Nocita v. Omaha, etc., Ry. Co. (Neb.)*, 440.

Last Clear Chance.

Statement of doctrine. *Hammers v. Colorado, etc., R. Co. (La.)*, 414.

Where railroad had last clear chance to prevent accident and did not avail itself of it, it will be mulcted in damages. *Ingram v. Louisiana, etc., R. Co. (La.)*, 457.

Pleading.

Sufficiency of complaint. *Birmingham, etc., Co. v. McCurdy (Ala.)*, 516.

Where city ordinance was relied on as a defense merely to an action for negligent injuries, it was admissible under the general issue, and was not required to be specially pleaded. *Flynn v. Chicago City Ry. Co. (Ill.)*, 627.

Question for court or jury, whether, negligence is a. *Baltimore & O. R. Co. v. Taylor (C. C. A.)*, 717.

Variance.

Plaintiff, suing for particular breach of duty, must prove that, and no other. *St. John v. Rhode Island Co. (R. I.)*, 625.

NUISANCES.

See STREET RAILWAYS.

PARENT AND CHILD.

See CHILDREN; PERSONAL INJURIES.

PERSONAL INJURIES.

See DAMAGES.

Damages.

Admissibility of evidence of plaintiff's habits of industry and sobriety, etc., as affecting amount of damages. *Felske v. Detroit United Ry. (Mich.)*, 422.

Punitive damages may be awarded in personal injury action, when. *Louisville & N. R. Co. v. Wilkins' Guardian (Ky.)*, 407.

Widowed mother can recover damages on her own account for injuries negligently inflicted on her minor son. *Crowley v. Pennsylvania R. Co. (Pa.)*, 649.

\$35,000 was not excessive recovery for injuries in question to trainman 35 years old. *St. Louis, etc., Ry. Co. v. Webster (Ark.)*, 687.

Evidence.

Evidence that plaintiff since his injury had been unable to attend to the business in which he had been engaged, or to any business, was competent to show extent and permanent nature of the injury. *Denver City Tramway Co. v. Cowan (Colo.)*, 472.

PLEADING.

See CARRIERS OF PASSENGERS.

PREFERENTIAL CLAIMS.

See TAXATION.

PROCESS.

Foreign railroad corporation having no property or agent authorized to make a contract or bind it in any way within the state was not subject to suit in Illinois by persons on a mere soliciting agent. *Booz v. Texas & P. Ry. Co.* 111, 537.

RAILROAD COMMISSIONS.

See INTERSTATE COMMERCE; SPURS AND SIDE TRACKS.

Orders.

Presumption that order of Railroad Commissioners requiring construction by railroad of spur track is reasonable and just. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Question whether order of Railroad Commissioners requiring railroad to construct spur track was unreasonable and arbitrary was one of law for the court. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Powers.

Ark. Const., Amend. 4, authorizing creation of the Railroad Commission, is not a limitation of the authority that may be vested in it for effecting all the purposes for which it was designed. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

General powers conferred upon the Railroad Commissioners for the regulation of common carriers in the interest of the public welfare are intended to confer other powers than those specifically enumerated. *Railroad Commrs v. Atlantic C. L. R. Co.* (Fla.), 247.

Legislature, having right to require construction by railroad of spur tracks, could delegate such power to Railroad Commission. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

State may require railroads to perform certain duties to the public and furnish proper and adequate facilities for transportation of freight and passengers intrastate, and may direct commissioners with such power. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Rates.

Burden rests on carrier, under certain statute, of showing unreasonableness of rates fixed by Virginia State Corporation Commission, appealing from order of the commission. *Washington So. Ry. Co. v. State Corp. Comm.* (Va.), 332.

Regulation by Courts.

Relief against unreasonable and unjust order of the Railroad Commissioners that the running of a regular intrastate train carrying passengers shall not be discontinued may be had in due course of law, and an unlawful refusal or failure of a railroad company to comply with a valid requirement may be redressed in the manner provided by law. *Railroad Commrs v. Atlantic C. L. R. Co.* (Fla.), 247.

RAILROADS.

See AGENCY; CARRIERS; LOGGING RAILROAD; NEGLIGENCE; RIGHT OF WAY; TAXATION.

Consolidation.

As affecting the character of a railroad line as a competition within Ky. Const., § 301, prohibiting consolidation of competing lines, the fact that competition is afforded by intersection with a third line can be considered. *Commonwealth v. Louisville & N. R. Co.* (Ky.), 683.

RAILROADS—Continued.

- Character of railroad line as one of two parallel lines, which under Ky. Const., § 201, must not be consolidated, is not affected by an unexecuted original plan of construction. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.
- Character of two lines as parallel lines as to three points, within the prohibition of consolidation thereof by Ky. Const., § 201, is unaffected by the fact that one of the roads owns another branch which is not parallel; nor because through trains are not run on one of the lines. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.
- Consolidation of parallel or competing lines, in violation of Ky. Const., § 201, cannot be upheld because it gives the public better service, nor because one of the lines cannot be operated independently at a profit. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.
- Ky. Const., § 201, prohibiting consolidation of "parallel or competing railroads," should not be read "parallel and competing." *Commonwealth v. Louisville & N. Ry. Co. (Ky.)*, 685.
- "Parallel lines" of railroads what constitute. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.
- Two railroad lines serving three important points in common, and distinct from each other at an average of about eight miles, are parallel, under the prohibition of consolidation by Ky. Const., § 201. *Commonwealth v. Louisville & N. R. Co. (Ky.)*, 685.

Corporate Powers.

- Corporation cannot enter into partnership. *Williams v. Johnson (Mass.)*, 273.
- Corporation has power to do such business only as it is authorized by its act of incorporation to do. *Williams v. Johnson (Mass.)*, 273.
- Deed by railroad, conveying its unused lands to trustees, was invalid, as creating a partnership between the railroad and parties who might be brought into the enterprise in question. *Williams v. Johnson (Mass.)*, 273.
- Deed by railroad, conveying unused land to trustees, who are authorized to acquire shares in other corporations in disposing of the property as contemplated by the deed, is void, as violating statute forbidding the holding by railroad of stock of other corporations. *Williams v. Johnson (Mass.)*, 273.
- Fact that railroad, seeking to dispose of unused land, has not been able to sell it for its estimated value will not justify its directors in putting such risks on the stockholders, by creating a trust for the purpose of carrying on the business of developing and using the property for profit. *Williams v. Johnson (Mass.)*, 273.
- In disposing of its unused land, railroad can do nothing more than what is fairly incidental to a reasonable disposition of the property for its market value, within reasonable time. *Williams v. Johnson (Mass.)*, 273.
- Proprietorship of real estate business by railroad company. *Williams v. Johnson (Mass.)*, 273.
- Right of railroad, holding lands to be disposed of as no longer available for railroad purposes, to continue to hold them as an investment, or otherwise. *Williams v. Johnson (Mass.)*, 273.
- That which corporation cannot do directly, because not within its corporate powers, it cannot do indirectly through the appointment of trustees. *Williams v. Johnson (Mass.)*, 273.

RAILROADS—Continued.**Medical Services.**

Sufficiency of petition in action against railroad for breach of contract to furnish or pay for medical aid or attention to one injured upon its cars or tracks. *Youngstown, etc., Ry. Co. v. Kessler (Ohio)*, 603.

Regulation.

Constitution and statutes of Florida together contemplate that the initial discretion as to the operation of trains shall be in those charged with the management of the railroad operations, and that the exercise of such discretion shall be subject to lawful governmental regulation. *Railroad Comm'rs v. Atlantic C. L. R. Co. (Fla.)*, 247.

Ultra Vires.

Contract to perform medical or surgical services by street railway corporation. *Youngstown, etc., R. Co. v. Kessler (Ohio)*, 603.

Street railway corporation cannot be directly liable for damages from malpractice of medicine or surgery. *Youngstown, etc., R. Co. v. Kessler (Ohio)* 603.

Street railway corporation may make valid contract to furnish or pay for medical aid or attention to one injured on its cars or tracks. *Youngstown, etc., R. Co. v. Kessler (Ohio)*, 603.

RAILROADS IN STREETS.

See **CROSSINGS; EMINENT DOMAIN; TRESPASSERS.**

REMOVAL OF CAUSE.**Separable Controversy.**

Case in which plaintiff has elected to sue jointly in tort a non-resident lessee railroad company and its resident corporate lessor, upon cause of action arising in the state, out of the negligent operation of the road, cannot be removed to federal circuit court as presenting a separable controversy between plaintiff and lessee. *Chicago, B. & Q. Ry. Co. v. Willard (U. S.)*, 1.

RIGHT OF WAY.

See **LOGGING RAILROADS.**

Forfeiture.

Condition that if grantee should fail to construct and continuously operate proposed railroad as to one track within two years between two points on its line, then the land granted should revert back to the grantors without repayment of the consideration, was a condition subsequent. *Springfield, etc., Co. v. Warrick (Ill.)*, 283.

Forfeiture of the land in question, for breach of condition subsequent of grant, would be inequitable and will not be enforced in equity. *Springfield, etc., Co. v. Warick (Ill.)*, 283.

Possibility of compensation in money. *Springfield, etc., Co. v. Warrick (Ill.)*, 283.

Location.

Contention in condemnation proceedings that the necessity of adopting the particular road location was not proven cannot be maintained. *Clark v. Superior Court (Wash.)*, 45.

Right of those invested with power of eminent domain for public purposes to make their own location according to their own

RIGHT OF WAY—Continued.

views as to what is best or expedient, without interference by courts. *Clark v. Superior Court* (Wash.), 45.

Under the conditions in question of the grant, the farm crossing provided for was to be completed within reasonable time after the road was completed, and the grantors could not recover damages for failure to construct the crossing as provided in the deed upon evidence of defective condition of the crossing before the road was completed. *Springfield, etc., Co. v. War-rick* (Ill.), 283.

SPURS AND SIDE TRACKS.

See EMINENT DOMAIN; INTERSTATE COMMERCE.

Ark. Act May 17, 1907, empowering Railroad Commissioners to order railroads to lay spur tracks, and an order made there-under, did not deprive the railroad of its property without due process of law. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Evidence was insufficient to show that Railroad Commissioners, in ordering railroad to construct spur track, acted unreasonably and arbitrarily. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

Reasonableness of order of Railroad Commissioners requiring railroad to construct spur track, test of. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

That cost of establishment and maintenance of spur track might greatly exceed the revenues from business done at the place because of such improvement did not necessarily show that order of Railroad Commissioners requiring railroad to construct such spur track was arbitrary and unreasonable. *St. Louis, etc., Ry. Co. v. State* (Ark.), 367.

STATIONS AND DEPOTS.**Abandonment.**

Removal of interurban railroad's stopping point 376 feet, to better the service, is not an "abandonment" of the station, within the statute in question. *Louisville & I. R. Co. v. Callahan* (Ky.), 792.

STOCK, INJURIES TO.**Signals.**

Motorman's duty to give signals when he sees, or should see, a horse on a crossing ahead of his car. *Swisher v. Interurban Ry. Co.* (Iowa), 734.

STREET RAILWAYS.

See BRIDGES; CARRIERS OF PASSENGERS; MASTER AND SERVANT; RAILROADS.

Burden of Proof.

Driver of vehicle struck by street car has the burden to show exercise of care by himself, and that the accident was caused by the negligence of the company's employees. *St. John v. Rhode Island Co.* (R. I.), 625.

Contributory Negligence.

Person in vehicle driven by another along streets at night without lights in violation of ordinance was chargeable with such violation as negligence per se where such vehicle was struck by street car. *Flynn v. Chicago City R. Co.* (Ill.), 627.

Request to charge that if plaintiff's automobile was being operated on defendant's track when it was not necessary to do

STREET RAILWAYS—Continued.

so, and when a car might be expected at any moment, and that fact contributed to the injury and was also apparent to plaintiff, then plaintiff could not recover, was properly refused. *Pantages v. Seattle Elect. Co.* (Wash.), 418.

Franchises.

Ordinance in question, granting street railways privilege of using streets, constituted a contract; and the ordinance of 1909 was, in effect, an attempt to revoke the former ordinance, and to deprive defendant of property and rights acquired under such contract, and was invalid. *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 596.

Street railway having franchise to operate cars on streets of city, may operate cars which are property of company which it has leased. *City of Pittsburg v. Pittsburg, etc., Ry. Co.* (Pa.), 281.

Street railway's privilege to use streets, granted by ordinance, right of municipality to revoke. *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 596.

Lookouts.

Motorman must exercise reasonable and ordinary care to discover persons on or near track in time to avoid injuring them. *Flaherty v. Butte Elect. Ry. Co.* (Mont.), 110.

Mutual Rights.

Traveler may operate his vehicle on street railway track when such part of the track is not in the immediate use of the company. *Pantages v. Seattle Elect. Co.* (Wash.), 418.

Police Power.

Power of city, by mere declaration, to show the operation of street railway to be a nuisance, and subject its tracks to removal. *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 596.

Right of city, under police power, to regulate business, etc., does not entitle it to prohibit lawful business, or to entirely suppress use of property. *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 596.

Presumptions.

Where traveler in street was struck by the swinging around of one of defendant's street cars, due to derailment of rear trucks, such derailment alone was insufficient to establish prima facie case of negligence. *Felske v. Detroit United Ry.* (Mich.), 422.

Proximate Cause.

Complaint sufficiently alleged motorman's failure to keep proper lookout was proximate cause of running car against child. *Flaherty v. Butte Elect. Ry. Co.* (Mont.), 110.

Regulation.

City has the right, under police power, to regulate use of tracks and cars of street railway in reasonable manner. *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 596.

STREETS AND HIGHWAYS.

See EMINENT DOMAIN.

SUMMONS.

See PROCESS.

TAXATION.**Liens.**

Statute in question, giving the state a lien on a street railroad company's property for a tax on certain dividends, does not give the state priority over a prior mortgage. *Central Trust Co. v. Third Ave. R. Co.* (C. C. A.), 269.

TICKETS AND FARES.

Contract of carriage was not changed by the issuance of continuous passage check in exchange for ticket, where the check indicated the same class of passage and time limit as the ticket but provided that, if it showed a 30-day limit, stop-over privilege might be had on application to the conductor. *Sanden v. Northern Pac. Ry. Co.* (Mont.), 223.

Limiting Liability.

Special ticket purchased at reduced rate is notice to its purchaser of its terms, and he is bound by them. *Sanden v. Northern Pac. Ry. Co.* (Mont.), 223.

Mileage Books.

Where railroad had no right to forfeit passenger's mileage book, taken and retained by a conductor, the passenger could recover the value of the book, with interest from the date of the taking. *Smith v. Southern Ry. Co.* (S. Car.), 800.

Stop-Over Privilege.

Condition in special contract ticket that it should be used before certain date, and that there should be no stop-over, cannot be waived after the ticket was exchanged for a continuous passage check which on its face showed that the limit was too short to allow a stop-over. *Sanden v. Northern Pac. Ry. Co.* (Mont.), 223.

One having special contract of carriage which did not allow him to stop over, cannot, having stopped over, complain that he was ejected from another train for refusal to pay full fare. *Sanden v. Northern Pac. Ry. Co.* (Mont.), 223.

TRESPASSERS.

See CARRIERS OF PASSENGERS; CHILDREN; LICENSEES.

Assumption of risks by person who goes upon train to confer with passenger, without giving trainman notice of his doing so. *Fox v. Minneapolis, etc., Ry. Co.* (Minn.), 176.

Contributory Negligence.

Question for jury what person on railroad trestle exposed to the danger of an approaching train, which was sounding an alarm, should, in the exercise of ordinary prudence, do for his own safety. *Myers v. Chicago, etc., R. Co.* (Iowa), 770.

Degree of Care.

Care due person walking across railroad trestle. *Myers v. Chicago, etc., R. Co.* (Iowa), 770.

Care due trespassers on train. *Sessions v. Southern Pac. Co.* (Cal.), 781.

Due licensee or trespasser on train. *Lawrence v. Kaul Lumber Co.* (Ala.), 141.

For injuries to persons riding on trains not intended for passengers, contrary to carrier's rules, even if by permission of the trainmen the carrier is liable only when the injuries are

TRESPASSERS—Continued.

caused by willful wrong or gross negligence. *White v. Illinois Cent. R. Co.* (Miss.), 520.

Railroad owes to trespassers on its cars the duty of using ordinary care to prevent injury arising from active negligence. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Trainmen's responsibility for safety of trespasser on track arises only when they are made aware of his presence and peril. *Baltimore, etc., R. Co. v. Welch* (Md.), 617.

Discovered Peril.

How plaintiff might prove that defendant's servants were made "aware" of deceased's presence on the track ahead of them in a position of peril in time for such servants to have avoided injury to him. *Baltimore, etc., R. Co. v. Welch* (Md.), 617.

Question for jury. *Baltimore, etc., R. Co. v. Welch* (Md.), 617.

Duty to hold train at way station to give person who has gone on train for conference with passenger time to alight, or to aid him in getting off the train safely by giving signals or lighting the station platform. *Fox v. Minneapolis, etc., Ry. Co.* (Minn.), 176.

Ejection.

Implied authority of freight brakeman to order trespassers off cars. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Question for jury whether brakeman was guilty of active negligence in ordering decedent and another young boy, riding on flat car of moving train on side track near main track on which another train was approaching, to "get to hell out of here." *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Where railroad's rules made trainmen while on trains subject to conductor's orders, evidence that it was the custom of brakeman to eject trespassers would not prove authority to do so, unless it also appeared that such acts were not pursuant to the authority of the conductor. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Lookouts.

Duty of trainmen to lookout for trespassers on track. *Baltimore, etc., R. Co. v. Welch* (Md.), 617.

Engineer's duty to lookout for helpless trespassers on track so far as may be consistent with other duties of his position. *Dempsey v. Norfolk & W. Ry. Co.* (W. Va.), 260.

Evidence did not show failure on part of engineer to keep reasonable lookout. *Spizale v. Louisiana Ry. & Nav. Co.* (La.), 256.

Railroad owes to trespasser only general duty to keep reasonable lookout on moving trains, and not to run over him after seeing him. *Spizale v. Louisiana Ry. & Nav. Co.* (La.), 256.

Servants of railroad company need not anticipate the presence of trespassers, except as to keeping the lookout in the operation of trains required by statute. *St. Louis, etc., R. Co. v. Williams* (Ark.), 786.

Proximate Cause.

Question for jury whether act of brakeman in ordering decedent and another boy from flat car, so that they jumped and were run over by another train, was proximate cause of the injury. *Verlinde v. Michigan Cent. R. Co.* (Mich.), 202.

Railroad, occupying for its tracks and terminals a strip of ground over which no street crosses for 2,711 feet does not owe any duty to a trespasser to cover drain on the strip. *Spizale v. Louisiana Ry. & Nav. Co.* (Ga.), 256.

TRESPASSERS—Continued.**Signals.**

Where it was not customary for railroad company to ring bell or sound whistle while switching in yard, except when passing street crossing, omission to do so on particular occasion was not actionable negligence toward one familiar with the movements of trains in the yard. *Spizale v. Louisiana Ry. & Nav. Co. (La.)*, 256.

Who Are.

Court erred in admitting evidence that persons had long been in habit of walking along the street and crossing the railroad tracks at the point in question. *Baltimore, etc., R. Co. v. Welch (Md.)*, 617.

One taking passage on train pursuant to arrangement with conductor for free passage, with knowledge that conductor had no right to allow him to ride free. *Sessions v. Southern Pac. Co. (Cal.)*, 781.

TRIAL.**Remarks of Counsel.**

Act of plaintiff's counsel in referring to the train crew as a "gang," instead of a crew, is not misconduct necessitating the setting aside of a judgment for plaintiff. *Myers v. Chicago, B. & Q. R. Co. (Iowa)*, 770.

ULTRA VIRES.

See RAILROADS.


VENUE.

Change of venue in controversies over the point of crossing of one steam railroad by another is not authorized. *Vandalia R. Co. v. La Fayette & L. T. Co. (Ind.)*, 59.

WATER AND WATER COURSES.

Liability of railroad company for causing land of riparian owner across stream in question to be washed away, as a result of changing its channel by making an embankment in constructing its railroad, is not affected by the fact that construction of the road was authorized by the state. *Cline v. Norfolk, etc., R. Co. (W. Va.)*, 611.

Where railroad, in properly constructing its roadbed, caused a stream to leave its usual channel on plaintiff's land and break into excavations on its right of way, it could erect barriers, in order to turn the stream back into its old channel, even if plaintiff's land was thereby injured. *Yazoo, etc., R. Co. v. Brown (Miss.)*, 10.

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